IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005634
First-tier Tribunal No:
HU/57402/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 August 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SADIRE AA JOOF
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Lawson, a Senior Home Office Presenting Officer (via Microsoft Teams as a result of a national rail strike).
For the Respondent: Mr Vokes of Counsel.

Heard at Birmingham Civil Justice Centre on 20 July 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision at First-tier Tribunal Judge Dieu ('the Judge') promulgated following a hearing at Birmingham on 30 August 2022, in which the Judge allowed Mr Joof's appeal against the refusal of his application for leave to remain in the UK on the basis of his family life with his partner.
2. Mr Joof is a citizen of Gambia born on 7 August 1977. The date of his application is 18 January 2021. His Immigration history shows he entered the UK on 24 June 2016 as a visitor, applied for asylum on 18 October 2016, which was refused on 19 April 2017, and on 18 January 2021 applied for further leave to remain as a spouse.
3. The Judge's findings are set out from [16] of the decision under challenge. The Judge records in [17] that Mr Joof accepted he could not meet the Immigration Rules for leave to remain as a spouse as he did not have the necessary leave to be in the UK.

4. At [18] Judge considers the question of whether Mr Joof is validly married, and concludes that the marriage to his wife ('the Sponsor') is valid.
5. At [21] the Judge records that Mr Joof's son passed away in May 2017 and that they visit the cemetery where his ashes are scattered, that the Sponsor has previously suffered with her mental health in 2008 and was admitted to a psychiatric hospital under the Mental Health Act 1983, and that her condition is regulated by antidepressant medication but flared up recently due to the uncertainty regarding Mr Joof's immigration status.
6. The Judge notes the Sponsor is a schoolteacher born and educated in the UK where she has family and that she has a professional and private life in the UK and earns in excess of the minimum financial requirement for entry clearance as a spouse.
7. At [23 – 24] the Judge writes:

> 23. Having assessed all of the evidence I am satisfied that the couple would be presented with insurmountable obstacles upon return. The Sponsor has lived in the UK her entire life. She has an established career as a teacher here. Whilst English is the predominant language in the Gambia, she does not speak any of the second languages nor would she be familiar with the culture. She had previously suffered significant adverse mental health which had become stable but is under threat from the prospect of her husband's uncertain immigration status and the consequences on their future. She had recently suffered a loss of her son (through adverse mental health) and she visits the cemetery where his ashes are scattered. Her private, professional and family life is in the UK. She owns property here and I have seen a number of support letters. I find that to have to address those obstacles would involve very serious hardship.
> 24. It follows that in considering this appeal through the lens of an Article 8 ECHR family life assessment, the Immigration Rules capable of being met I find that that is determinative of the proportionately assessment. I find that the Appellant has a family life with his wife in the UK and the Respondent's decision is a disproportionate interfere with that life.

8. The Secretary of State sought permission to appeal on two grounds, the first asserting the Judge committed a procedural or other irregularity in refusing a request for an adjournment by the Home Office Presenting Officer on the basis the Judge believed there had been enough time to instruct another representative, when the request was made on a Friday with the First-tier Tribunal earlier responding shortly before the close of business, with the hearing taking place on a Tuesday following a Bank Holiday Monday. It is asserts this was unfair to the Secretary of State.
9. Ground 2 asserts failing to give adequate reasons for findings on a material matter, in failing to reason why the sponsor would not be able to work as a teacher in Gambia where the prominent language is English, that Mr Joof was a trained nurse with no reason why he could not find employment in Gambia, and with there being no reason why they could not return to Gambia as a family unit. The Grounds assert the Sponsor owns a house which she could sell and use the funds to establish a family in Gambia with no medical evidence setting out why living in Gambia would amount an insurmountable obstacle to family life. It is stated the public interest is not outweighed by the family's Article 8 rights.
10. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

> 3. The first ground alleges that the Judge erred in the exercise of his discretion. The ground is perhaps not accurately posited however. The adjournment request was made but was refused by a TCW. They gave a direction stating that the matter was to be heard via CVP/VHS remotely. The first application to adjourn was refused. That the matter was to be a hybrid hearing was communicated to the HO at 16.25 on the

Friday afternoon. Allowing for the fact that email is not an instant system and allowing for the fact that there would have needed some time to find a HOPO this is arguably cutting matters very fine given it was a Bank Holiday weekend. Although Judge Dieu makes a commendable point about allowing time on the day, it is arguable that given there was nobody to instruct this was otiose and there would have been no idea the Judge would have been so charitable. It is arguable therefore that the Home Office have been denied an opportunity to be represented and put their case as they would have been able to do so. I ponder what would be the permission outcome had the shoe been on the other foot? It is highly likely an appellant would be granted a second and proper bite at the cherry. Permission is thus granted on ground 1.

4. Ground 2 is arguable. The matters raised in the grounds as to suggested deficiencies in the reasoning are arguable.

Discussion and analysis

11. Following the lodging of the appeal against the decision refusing his application by Mr Joof the matter was listed for hearing on Tuesday 30 August 2022.
12. On Friday 26 August 2022 an application was made by the Secretary of State in the following terms:

> Good afternoon,
>
> Due to illness (Covid related) of a PO we are unable to allocate a PO to List 2 next Tuesday. We would be able to provide a Presenting Officer to attend remotely from another unit but understand that you have no capacity to offer hybrid on this day.
>
> These are cases where the Respondent wishes to ensure representation. I therefore have no alternative but to respectfully request an adjournment for case HU/57402/2021. I apologise for the lateness of this request but it is being made as soon as possible after learning that the PO is not going to be able to attend Court.
>
> Given the reason for the adjournment request it could be relisted as soon as possible after 30 August. In making this application I refer to The Tribunal Procedure (First-tier Tribunal) (Immigration and now Asylum Chamber) Rules 2014, in particular the Overriding Objective 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.
>
> This application is made on the basis of ensuring that the case is dealt with fairly and justly and that the Respondent is able to participate fully in the proceedings.
>
> I look forward to hearing from you.
>
> Kind regards, Anna Brown Team Manager Birmingham POU.

13. Mr Lawson advised that the request was transmitted at 15:32 on 26 August 2022.
14. The application was refused by a Tribunal Case work on the same day. The entry on the First-tier Tribunal case management system reads:

The application to adjourn the hearing is refused. Rather, it would be converted to a hybrid hearing so that the PO can attend remotely on that day. Legal Officer Okuashi.

15. Mr Lawson confirmed that the response from the First-tier Tribunal was received at 16:30 hours on 26 August.
16. The Judge records a further email having been received from the Secretary of State. At [9] the Judge writes:

> 9. At the outset of the hearing earlier email was received from the Respondent:
>
> 'Our records show an adjournment was being requested for this listed due to the sickness of Anna Brown on 26 August.
>
> I note that the initial hybrid requests were refused, hence the original adjournment request on the 26th and the later a Hybrid was found to be possible at 16:20 5 PM on the 26th by which time we could not find cover to this being too late for a PO to prep the list. Therefore another request for adjournments was submitted to yourselves by Anna Brown on the evening of the 26. Adjournment requests were made both on MYHMCTS and by email.
>
> I will therefore reiterate request for adjournments as per Anna's previous emails last week due to PO's sickness.'

17. At [12] the Judge writes:

> 12. The Respondent had initially said that he will be able to provide remote representation from another unit. The Respondent then said that one could not be provided because there was insufficient time to 'prep the list'. I find that there is a difference in not being able to have a representative present at all, and being able to have one but one which had not had sufficient time to prepare. The latter was the position here. As such I could see no reason why the Respondent could not have been represented today and the readiness or otherwise of that advocate to conduct the case ought to have been discussed before me. It would not for instance have been beyond the reasonable options available for me to have allowed Respondent some time today to prepare. That may or may not have been sufficient, but the Respondent was not present to address me on that. I therefore found it to be in the interest of justice not for there to be further delay and expense incurred in this case.

18. It was not disputed before me that the request on 26 August 2022 was made on the Friday immediately preceding the August bank holiday weekend and that the first day back after the bank holiday was the day of the hearing, Tuesday 30th August 2022.
19. Mr Vokes opposed the appeal submitting, inter-alia, a lack of any Presenting Officer attending before the judge to explain the Secretary of State's position, by reference to an organisation the size of the Home Office and the fact it employs a number of Presenting Officers, the fact that all the Judge had was the emails, that it was not made out another Presenting Officer could not have prepared the case, that paragraph 9.5 of the Practice Direction required most exceptional circumstances which had not been established, the Secretary of State had not done enough to get alternative representation, that there was no reference in the application to the relevant practice direction, and that it was necessary to consider the position if an appellant had made the application when, if Counsel's attendance was the issue, an adjournment request was more than likely to have been refused and the applicant told to try and make alternative arrangements.
20. The Practice Directions for the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal addresses the issue of adjournments in section 9. That reads:

9. Adjournments

9.1. Applications for the adjournment of appeals (other than fast track appeals) listed for hearing before the Tribunal must be made not later than 5.00p.m. one clear working day before the date of the hearing.
9.2. For the avoidance of doubt, where a case is listed for hearing on, for example, a Friday, the application must be received by 5.00p.m. on the Wednesday.
9.3. The application for an adjournment must be supported by full reasons and must be made in accordance with relevant Procedure Rules.
9.4. Any application made later than the end of the period mentioned in paragraph 9.1 must be made to the Tribunal at the hearing and will require the attendance of the party or the representative of the party seeking the adjournment.
9.5. It will be only in the most exceptional circumstances that a late application for an adjournment will be considered without the attendance of a party or representative.
9.6. Parties must not assume that an application, even if made in accordance with paragraph 9.1, will be successful and they must always check with the Tribunal as to the outcome of the application.
9.7. Any application for the adjournment of a fast track appeal must be made to the Tribunal at the hearing and will be considered by the Tribunal in accordance with relevant Procedure Rules.
9.8. If an adjournment is not granted and the party fails to attend the hearing, the Tribunal may in certain circumstances proceed with the hearing in that party's absence.

21. The circumstances in which a court or tribunal may decide to proceed in the absence of an advocate whose adjournment request has been refused are governed by the principle of fairness.
22. It is unfortunate, and has not been satisfactorily explained before me, why the earlier request made by the Presenting Officer for the hearing to be converted to a hybrid hearing was refused, but later granted. Had that original request been granted it is likely that alternative arrangements could have been made for a hybrid hearing. The request was clearly made prior to the email of the 26 August requesting the full adjournment being sent.
23. However big the Home Office may be, and however many other Presenting Officers there may be, the facts as presented are that the chronology and the rejection of the adjournment request and statement it could be converted to a hybrid hearing was not communicated to the Presenting Officers Unit until late in the day on the Friday before the bank holiday.
24. The reason there was no attendance before the Judge on the day was because there were no Presenting Officers' available to do it. Mr Lawson submitted that whether there was an individual available to attend who would have the ability to make the application or to conduct the hearing depended upon whether those with relevant experience were available. It is an unfortunate reality of life within the First-tier that letters are frequently received from the Presenting Officers Unit stating that as a result of a shortage of available Presenting Officers no one will be attending to represent the Secretary of State's interests in a particular list.
25. Although, in some circumstances, counsel has been instructed when there is no Presenting Officer available it is not made out that at such short notice, especially in light of the bank holiday, alternative representation could be arranged.
26. In relation to Mr Voke's comparative submission concerning applications by representatives on behalf of the appellants, he is correct to note that if it is deemed sufficient time is available and representation required, an application based upon the nonavailability of the chosen representative may be refused, again subject to the overriding objectives and fairness. If, having had an initial

adjournment request refused on the basis of alternative representation and has been established that there is no realistic prospect of alternative representation resulting in a further adjournment request, the adjournment may be granted. Each case is fact specific.

27. There is no challenge to the genuine nature of the application for an adjournment for the reasons stated. As stated, is unfortunate that whoever gave the impression a hybrid hearing was not possible did so. Be that as it may, that resulted in the email from the Secretary of State sent to 15:32 hours to which a response was not received until one hour later. I do not find it in an unreasonable submission made by Mr Lawson that in light of this chronology, especially with the prevailing bank holiday, there was no realistic chance of organising alternative representation by another Presenting Officer or counsel.
28. The decision of the Judge not to proceed does not appear to have taken proper account of the specific facts of this case, especially in the conclusion that the Judge could see no reason why the Secretary of State could not have been represented before him, when the applications that were made clearly show there was no representative available. The Judge refers to the fact he may have granted additional time had a Presenting Officer appeared, but this does not get round the fact that the only material before the Judge was a clear statement that there was no alternative presenting officer. Even if the earlier request for a hybrid hearing indicated that alternative representation could be obtained, the fact that was refused in an earlier and only communicated as an option very late in the day meant that there was insufficient time to seek an alternative Presenting Officer to conduct a hybrid hearing. There are exceptional circumstances on the facts, with particular reference to the chronology of events.
29. I do not accept the Secretary of State application is mere disagreement with the Judge's findings as submitted by Mr Vokes. I find that the decision of the Judge not to adjourn the hearing, for the reasons set out in the determination, denied the Secretary of State the opportunity to be represented at the hearing, which she clearly indicated she wished to be. I find that amounts to a procedural unfairness sufficient to amount to a material error of law.
30. Although Mr Vokes, in the alternative if this was found, submitted that there should be preserved findings in relation to the marriage between the appellant and his partner, the Court of Appeal have made it abundantly clear that in a case where procedural fairness is established it is not appropriate to preserve findings of fact even if they appear to be credible. That is an understandable position as the making of submissions on issues by the party who was unable to attend may be material to that finding too.

Notice of Decision

31. I set the decision of the Judge aside. There shall be no preserved findings. The appeal shall be remitted to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Dieu.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 July 2023