IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-000222
& UI-2023-000223
First-tier Tribunal Nos: EA/15801/2021
& EA/15804/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 June 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MUZAMIL AHMAD
MUZAFAR AHMAD
(no anonymity order made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chakmakjian, instructed by Haq Hamilton Solicitors
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 28 April 2023

DECISION AND REASONS

1. The appellants appeal, with permission, against the decision of the First-tier Tribunal dismissing their appeals against the respondent's refusal to issue them with an EEA Family Permit under the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations").

2. The appellants are nationals of Pakistan and are twin brothers, both born on 24 September 1996. They applied for an EEA Family Permit on 25 December 2020, as the family members of their brother, Mudasar Mukhtar, a Portuguese national who had

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been living in the UK since 7 July 2020. The first appellant's application was refused on 5 May 2021 and the second on 7 May 2021, both on the grounds that the respondent was not satisfied that they were related to the sponsor or that they were financially dependent upon the sponsor for the purposes of regulation 8 of the EEA Regulations 2016. The refusal decision for the first appellant included a further basis for refusal, namely that the respondent was not satisfied that the sponsor was residing in the UK as a qualified person in accordance with regulation 6 of the EEA Regulations 2016. The respondent was not satisfied that the one document submitted in relation to the sponsor's claimed business was sufficient to show that he was exercising treaty rights in the UK, was not satisfied that the birth certificates submitted for the appellants was sufficient to show their relationship to the sponsor and was not satisfied that the money transfer receipts produced were sufficient to show that the appellants were dependent upon the sponsor to meet their essential needs.

3. The appellants gave notice of appeal against the respondent's decisions out of time, on 21 July 2021. At that time they were represented by a different firm of solicitors, Commonwealth Solicitors. The solicitors sought initially to lodge the appeals on their behalf on 10 June 2021, outside of myHMCTS. The appeals were re-submitted by the Tribunal through myHMCTS on 21 July 2021. Following an application for an extension of time, time was extended and the appeals were admitted. The grounds of appeal, dated 10 June 2021, referred to the documents submitted with the applications and asserted that those documents were sufficient to demonstrate dependency. It was stated within the grounds that further documentary evidence would be submitted before the hearing.

4. According to the Tribunal's records, directions were issued and sent in August and September 2021 to the appellants' solicitors, Commonwealth Solicitors, for the filing and service of documents by 17 November 2021. On 26 October 2021 the solicitors notified the Tribunal that they had been unable to obtain instructions from the appellants or the sponsor and on 27 October 2021 they therefore came off the record as acting for them. On the same day, the Tribunal emailed the sponsor to request details of any new legal representatives following advice by the appellants' previous representatives that they were no longer instructed.

5. On 15 December 2021 the First-tier Tribunal issued directions to the parties (addressed to the appellants in person) directing them to provide the Tribunal with their contact details and to take the following steps in accordance with the 'Summary Timetable':

Period within which step is to be taken	**Action**
Not later than 14 days after the date of this Notice	Respondent's bundle ("RB") must be provided
28 days after provision of RB or 42 days after notice of appeal, whichever is later Case	Appellant must provide: (i) Appellant's Explanation of (ii) Bundle of evidence in support
14 days after provision of appellant's AEC and Evidence	Respondent must provide: Review with counter-schedule

6. On 30 May 2022 the First-tier Tribunal made the following directions to the parties:

"DIRECTIONS
(no respondent bundle)

1. The Respondent has failed to file a bundle in accordance with directions given on 30/11/2021.

2. If the Appellant has not already done so, they should file and serve all documents that
will be relied upon by the Appellant at the hearing of this appeal, within 14 days from the date of issue of these Directions.

3. The hearing of this appeal will take place on the first available date after 14 days from
the date of issue of these Directions. This will be a final hearing not a Pre-Hearing Review or a Case Management Review. The Tribunal will proceed on the basis that the Respondent relies only on the refusal decision.

4. Either party may make an application to vary these directions at any time.

5. Any failure to comply with the directions may be taken into account when considering the issue of costs. "

7. According to the appellants' grounds of appeal, the directions were actually issued on 5 June 2022, at the same time as the parties were notified of the date of the hearing which was to take place by video-link on 28 July 2022. The grounds also assert that the sponsor emailed the Tribunal on 11 July 2022 seeking an adjournment request on the basis that he had to travel to Pakistan in an emergency, that the papers for the appeal were not yet completed and that he wanted to attend the hearing in person rather than by video-link. The grounds assert that in the absence of a response from the Tribunal a further request was made on 19 July 2022 and again on 25 July 2022 to which no response was received.

8. The appeals then came before First-tier Tribunal Hussain on 28 July 2022. The sponsor attended by video-link and applied for an adjournment on the basis that he needed more time to get his documents together and provide an appellant's bundle and to appoint a lawyer. Judge Hussain refused the adjournment request and proceeded to hear the appeals. He noted that there were three issues to be determined: firstly, whether the sponsor was exercising treaty rights in the UK; secondly, whether the appellants were related to the sponsor; and thirdly, whether the appellants were reliant on the sponsor for their essential needs. With regard to the first, he found that the single letter from the sponsors' accountants, asserting that he was a self-employed director with earnings of £40,000 a year, was not sufficient to prove his economic activity in the UK. With regard to the second, he found that the appellants' birth certificates alone did not prove their relationship to the sponsor. With regard to the third, he found that the limited money transfer receipts were not, without more, evidence of dependency. The judge observed further that there was no evidence of what the appellants' essential needs were and no explanation as to why two able-bodied men required support from a relative living in a foreign country. The judge concluded that the appellants had not shown that they were eligible for family permits as claimed and he dismissed the appeals in a decision promulgated on 25 October 2022.

9. The appellants, having since instructed Haq Hamilton Solicitors, sought permission to appeal to the Upper Tribunal against Judge Hussain's decision through their solicitors. Permission was sought on two grounds. Firstly, that the judge, by refusing to adjourn the proceedings, had failed to have due regard to the overriding objective to

deal with their case fairly and justly in accordance with the principles in Nwaigwe (adjournment: fairness) [2014] UKUT 418 and that they had thereby been deprived of a fair hearing. It was asserted that the judge had failed to have regard to all relevant factors, including the sponsor's prior adjournment requests, and to the respondent's failure to comply with directions in filing and serving their appeal bundle, which was not filed until 9 June 2022. Secondly, that they were now in possession of evidence to show that the sponsor was exercising treaty rights, that they were related to the sponsor as claimed and that they relied financially upon the sponsor for their essential needs. It was asserted that the judge had misdirected himself and had had regard to irrelevant matters when commenting on the lack of any explanation as to why two able-bodied men required support from a relative living in a foreign country, since that suggested that he had not followed the correct test.

10. The First-tier Tribunal refused permission to appeal, but permission was subsequently granted on a renewed application to the Upper Tribunal, with particular focus on the first ground.

11. The matter then came before me for a hearing, by which time the appellants had submitted bundles of evidence relating to the three issues identified by Judge Hussain.

Hearing and submissions

12. Both parties made submissions before me.

13. With regard to the first ground, Mr Chakmakjian relied upon the principles in Nwaigwe in submitting that, whilst having 'good reasons' for an adjournment was a relevant consideration for the judge, the overriding test to be applied when considering an adjournment request was that of fairness. He submitted that Judge Hussain had not considered the question of fairness and as a result he had acted with procedural unfairness by proceeding with the appeal. Mr Chakmakjian submitted that, when having regard to the amount of time the appellants had had to prepare for the appeal, the judge had failed to consider the timetable set out by the Tribunal and the directions given, and had failed to consider that the directions had had to be varied shortly before the hearing because the respondent had failed to serve her appeal bundle. The judge had failed to give any consideration to the fact that the appellants were out of the country and without legal representation and that English was not their first language, and he had failed to consider the procedural background to the appeal and the fact that there was no further opportunity to make another such application following Brexit. With regard to the second ground, Mr Chakmakjian submitted that it was clear from the evidence now produced that the appellants would have been able to provide the relevant evidence if they had been given more time. The issues which the judge considered had not been put to the sponsor and the judge had considered irrelevant matters.

14. Mr Wain submitted that the judge had considered the 'overriding objective', albeit not directly, and had therefore complied with the fairness requirement in Nwaigwe. With regard to the late service of the respondent's bundle, it was relevant to note that a bundle had been served in relation to one of the appellants in December 2021 and so the appellants would have been familiar with the documents prior to the service of the second bundle in June 2022. In any event, there had still been a delay by the sponsor, from 5 June 2022 to 28 July 2022. The adjournment request was not made until 10 July 2022 and it did not refer to a need to obtain legal representation. Further, there was no reason why the sponsor could not already have accessed the relevant documents. The judge considered all relevant matters. With regard to the point about

Brexit, it was still open to the appellants to make an application in a different category. The judge acted fairly.

15. Mr Chakmakjian, in response, reiterated the points previously made.

Discussion

16. Judge Hussain set out his reasons for refusing the adjournment request at [6], finding that the appellants and sponsor had had well over a year, since May 2021, to arrange legal representation and to get the documentation together. It is the appellants' case, relying upon the principles set out in Nwaigwe, that the judge had failed at [6], however, to consider what was the relevant test, namely that of fairness. I do not agree that that is the case. The fairness test was taken by the Upper Tribunal in Nwaigwe to derive from the "*overriding objective*" in Rule 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 together with the second part of Rule 21 which obliged the Tribunal to consider whether the appeal could be "*justly determined*" without an adjournment. Although the judge did not set out that test in terms, he referred to the "*interests of justice*" at [6] and I am accordingly in agreement with Mr Wain that he applied the correct test, albeit perhaps not directly.

17. In any event, applying the fairness test myself, I have considered whether the judge acted fairly in refusing to adjourn the proceedings or whether the appellants were deprived of a fair hearing. I find no reason to conclude that the judge's decision to proceed with the appeals was unfair.

18. Upper Tribunal Judge Grubb granted permission to the appellants on the grounds that it was arguable that Judge Hussain failed to grapple with the history and background circumstances of the adjournment application and the history of pre-hearing adjournment applications. Having had the benefit of giving detailed consideration to that history and background I do not consider that anything material arises from Judge Hussain's arguable failure specifically to address it. Although the sponsor made three adjournment requests prior to the hearing, those requests were made only shortly before the hearing and he was not entitled to assume that an adjournment would be granted. Further, the three bases given for the adjournment, that he had go to Pakistan in an emergency, that his papers were not completed and that he wanted to attend in person, were not supported by any evidence or reasons, and the sponsor was in attendance at the hearing in any event, albeit remotely due to Covid. It is also relevant to note that there was no reference in those adjournment requests to any intention to arrange legal representation: that was only raised by the sponsor at the hearing.

19. With regard to the sponsor's request for more time to complete the paperwork, Mr Chakmakjian submitted that it was unfair of the judge to reject that request on the basis of the appellants having already had from May 2021 to prepare the evidence, when in fact he should have considered the relevant period to have been from June 2022 when the respondent served her appeal bundle, after failing to comply with the directions of the Tribunal. However, it seems to me that the judge was perfectly entitled to consider the relevant period as running from May 2021 when the appellants received their refusal decisions, since the case against them became clear from that time and they were put on notice of the inadequacies in the evidence they had already produced with their applications and the kind of evidence which was required of them. It was at that point that the appellants and the sponsor ought to have started

preparing and putting together their evidence, whether or not that was the appropriate time actually to serve their appeal bundles. The timetable provided by the Tribunal and the directions issued were therefore not material to the consideration of the time available to the appellants for preparing their case. In any event, as Mr Wain said in his submissions, although the respondent only served her bundle for the first appellant on 9 June 2022, the bundle for the second appellant, which contained the same documents, had been served on 21 December 2021 in accordance with the court directions and the appellants were therefore not disadvantaged in any way by the delay in service of the second bundle. In any event the appellants clearly had plenty of opportunity to prepare their documents, even if the relevant period was taken to be from 9 June 2022.

20.The grounds at [7] assert that the Tribunal ought to have been aware that the appellants had been unrepresented at all stages of these proceedings. However that is not entirely correct. As is evident from the chronology I have set out above, the appellants were previously represented, by Commonwealth Solicitors, who lodged the appeals on their behalf and who ceased to represent them when they were unable to obtain instructions from them and from the sponsor. Those notices of appeal specifically stated that further evidence was to be submitted prior to the hearing and the appellants and sponsor were therefore fully aware of the need to provide such evidence. As for the issue raised by Mr Chakmakjian that the judge ought to have considered the impact of Brexit on the appellants' ability to make such an application again, I do not consider that that was a matter for the Tribunal. In any event, it is relevant to note that the appellants made their application within only a few days of the route being closed for applications under the EEA Regulations 2016. Had they applied earlier they would have had an opportunity to make a further application if necessary and therefore it was their own actions which led to their current situation.

21.In all of the circumstances I do not consider that there was any procedural unfairness in Judge Hussain refusing to adjourn the proceedings. In terms of the factors referred to at [19] of the appellants' grounds, there was no reason to believe that the delay in obtaining the evidence was due to matters outside the control of the appellants or sponsor and, further, the application to adjourn was speculative as there was no reason, in light of the significant period of time which had already elapsed, to believe that the documents would be produced within a reasonable period of time or that the relevant documents existed in any event. The fact that the sponsor has now produced bundles of evidence is not material to the relevant question faced by the judge at the time. No reasons are provided as to why those documents were not produced for the hearing, particularly given that many of the documents pre-dated the hearing. Judge Hussain was fully and properly entitled to proceed with the appeal as he did and he was fully entitled to reach the adverse conclusions that he did.

22.I find no merit in the second ground of appeal: the judge had regard to all relevant matters which were the three issues arising in the appeal, he considered the evidence available to him and he gave cogent reasons for finding that that evidence did not demonstrate that the sponsor was exercising treaty rights in the UK, that the sponsor and appellants were related as claimed or that the appellants were financially dependent upon the sponsor for their essential needs. On the evidence available, the judge properly found that the appellants could not show that the requirements of the EEA Regulations 2016 were met and he was entitled to dismiss the appeals on the basis that he did.

Notice of Decision

23. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 May 2023