Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07253/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th April 2016	**On 14th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR EMMANUEL BAYIHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr. S Unigwe, Instructed by TM Legal Services
For the Respondent: Mr. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Frazer promulgated on 15th September 2015, in which she dismissed the appeal against

the decision of the Secretary of State for the Home Department of 17th February 2015, to refuse the appellant leave to enter the UK.

Background

2. The appellant is a national of Cameroon. On 17th February 2015 the appellant sought admission to the UK as the family member of Armelle Dassong, a French national with a right to reside in the United Kingdom under the Immigration (European Economic Area) Regulations 2006. The appellant was refused leave to enter because the Immigration Officer was not satisfied that Armelle Dassong is a qualified person in accordance with the Regulations and that the appellant is the family member of an EEA national with a right to reside in the United Kingdom under those Regulations.

The decision of the First-tier Tribunal

3. The appellant attended the hearing of his appeal before the First-tier Tribunal. He was not represented. The Judge sets out the background to the appeal before her at paragraphs [1] to [5] of her decision. The appellant applied for an adjournment. At paragraphs [7] and [8] of her decision, the Judge records:

> "7. The Appellant went on to say that the lawyers had his files containing documentation which showed proof of his wife's work and her address. He had seen his lawyers the previous Friday who had advised him to seek an adjournment in the interests of justice. The Appellant was unable to give any adequate explanation as to why he had not requested copies of the documents so that he could produce them at court today. The Appellant indicated that he would definitely be in a position to pay for representation on the next occasion if the hearing were adjourned. He said that his parents just have money to pay for their bills and food back in Cameroon.

> 8. The Appellant presented a divorce certificate in French which was sealed by the Ministry of Justice in Cameroon and which was dated 18th August 2015. The Appellant stated that the divorce had now been finalised.

4. The Judge refused the application for an adjournment. At paragraph [9] of her decision she states:

> "9. I declined the application. The Appellant had presented a certificate of divorce from Cameroon in relation to his wife and it was unclear what the basis for his appeal would be. There was no guarantee that the Appellant would be able to pay for his lawyers on the next occasion. The Appellant was able to articulate himself well in front of me. I was therefore satisfied that he would be able to present his case and a lack of representation would not unduly prejudice him. There was no adequate explanation for why he could not have obtained any relevant documents, or at least copies thereof, from his lawyers for the hearing today. I determined that it was in the interests of justice to proceed.

5. Having refused the application for an adjournment, the Judge went on to consider the appeal. The evidence of the appellant is set out at paragraph [10] of the decision. At paragraphs [12] to [17] of her decision, the Judge sets out the legal framework and at paragraphs [19] to [22] she sets out her conclusions. The Judge states:

> "19. I am not satisfied that the Appellant's spouse is a 'qualified' person within the meaning of Regulation 6. There is no evidence that she is now present in the United Kingdom or that she is working here. The evidence from the Appellant suggests that she left the United Kingdom in 2014. The Appellant has produced a certificate of divorce dated 18th August 2015 and sealed by the Yoko court in Cameroon.
>
> 20. At the time of the divorce the Appellant was not the family member of a qualified person. The information that was before the Respondent on 17th February 2015 from the Appellant was that the Appellant's spouse was not in the

United Kingdom. No evidence was produced by either the Appellant or his spouse regarding her work or employment status in the United Kingdom.

21. I am satisfied therefore that at the time of entry into the United Kingdom the Appellant was not joining an EEA national in the United Kingdom or that the EEA national (namely Armelle Dassong) had a right of residence under the Regulations. At the time of entry therefore he did not meet the requirements of Regulations 19(2)(b) and 11(2) of the Immigration (EEA) Regulations 2006.

22. Consequently at the time the divorce was pronounced on 18th August 2015 the Appellant could have had no retained right of residence under Regulation 10(5) of the Immigration (EEA) Regulations 2006 as he was not then the family member of a qualified person. His spouse had left the United Kingdom to institute divorce proceedings in Cameroon. Further, he has not retained a right of residence in accordance with the ruling in Singh as his wife left the country to commence divorce proceedings in Cameroon."

6. The appellant appeals the decision of the First-tier Tribunal Judge to refuse the application for an adjournment. The appellant claims that the refusal to grant an adjournment was to deprive the appellant of his rights to a fair hearing; **Nwaigwe (adjournment: fairness) [2014] UKUT 418**. The appellant states that the Judge misapplied the Immigration (EEA) Regulations 2006, and that the appellant is a qualified person under regulations 11 and 15.

7. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 28th January 2016. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Frazer involved the making of a material error of law, and if so, to remake the decision. The respondent has filed a Rule 24 response in which she confirms that the appeal is opposed.

The hearing of the appeal before me

8. The appellant attended the hearing that was listed for 10am. The appellant was expecting to be represented and so I put the hearing to the back of my list. The matter was called on at 12:50pm but there was still no appearance by the appellant's representatives. I spoke briefly to the appellant who confirmed to me that he had been expecting his representatives to attend the hearing. At my request, the Tribunal clerk made a telephone call to the offices of the appellant's representatives, TM Legal Services, to establish why they had not attended the hearing. The Tribunal clerk was able to speak to a clerk at the offices of the appellant's representatives, and was told that the person with conduct of this matter is away on holiday, and would not be back for a week or so. They had instructed somebody to attend the hearing before me, but they were unable to identify who had been instructed.

9. I explained the outcome of the Tribunal's enquiries to the appellant. The appellant confirmed that he had spoken to his representatives on 22nd of March 2016 and had paid them £850 for the preparation of the appeal, and representation at the hearing before me. The appellant had not been told who would be representing him at the hearing. The appellant was not aware of any steps taken by his representatives in preparation and readiness for the hearing before me. The appellant confirmed that he wished to proceed with the hearing of the appeal without his representatives.

10. Given the time, and in fairness to the appellant, I adjourned the matter to 2pm. I informed the appellant that I was concerned about the lack of any communication from his representatives and in particular, their inability to identify who it was, that should be attending the hearing to represent the appellant. I was concerned about the conduct of the appellant's representatives and I informed the appellant that I would adjourn the matter until 2pm for the appellant to consider whether he wishes to proceed without any representation, given the history of the matter and in any event, for the appellant's representatives to appear and explain their

conduct. The Tribunal clerk telephoned the appellant's representatives to inform them that I required their attendance before me, at 2pm.

11. Shortly after 2pm, Mr Sylvester Unigwe attended to represent the appellant. I returned at 2.15pm and Mr Unigwe explain to me that he had been instructed at 1:55pm and that he had not previously seen any papers relating to the appeal**.** He had been shown some papers upon his arrival at the Tribunal by Mr Whitwell, but he had not had any opportunity to properly consider the papers. He was unable to provide any explanation for the failure of the appellant's representatives to attend at 2pm as I had directed. Equally he had no information as to who the appellant's representatives had instructed, to appear on behalf of the appellant at the hearing that was listed for 10am. Further calls made by Mr Unigwe to those instructing him were not being answered and were going straight to voicemail. Mr Unigwe confirmed to me that he has been provided with copies of various documents by Mr Whitwell. He had been provided with copies of the documents before the Tribunal:

a. a copy of the Notice of Refusal of leave to enter;
b. a copy of the decision of First-tier Tribunal Judge Fraser
c. a copy of the grounds for permission to appeal to the Upper Tribunal;
d. a copy of the decision of First-tier Tribunal Judge Hollingworth granting permission to appeal;
e. a copy of the respondent's Rule 24 response;

12. I again adjourned the matter for a short period to enable Mr Unigwe to read the papers that he had been provided with, and to obtain his clients instructions.

13. The hearing before me commenced at 2:50pm. There was no application by Mr Unigwe to adjourn the hearing to another date. Mr Unigwe submitted that the First-tier Tribunal Judge should have adjourned the matter because the appellant had provided an adequate explanation for the lack of representation. He

submitted that the appellant has been denied justice by the failure of the First-tier Tribunal Judge to grant an adjournment. He submits that the appellant is entitled to a full presentation of his case and that the Judge had been proved wrong, because the appellant has managed to pay for representation. He relied upon the matters set out in the grounds of appeal. He relies upon the decision in **Nwaigwe (adjournment: fairness) [2014] UKUT 418**, although he did not have a copy of that decision for me. He has not himself read that decision, but relies upon it nonetheless.

14. The respondent has filed a Rule 24 response dated 4th March 2016. The respondent opposes the appeal and submits that the Judge directed himself appropriately. The respondent submits that the Judge gave adequate reasons for reasons for refusing the adjournment request including the fact that the appellant had since divorced from his wife. The respondent submits that even if the appellant was able to obtain the documentation, it was clear on his own evidence that his partner had left the UK and had not been exercising treaty rights at the relevant time – namely the date of divorce. As such it was submitted the refusal of an adjournment was fair on the facts of this case.

15. Mr Whitwell adopts the Rule 24 response and submits that at paragraphs [6] to [9] of her decision, the Judge gave adequate reasons for refusing the application for an adjournment. He submits that when stopped by an immigration officer the appellant told the immigration officer that his wife has not worked in the UK for a period of 3 to 4 years between 2011 and 2014. He submits that an adjournment would not have assisted the appellant because there is no evidence that the appellant's wife was working or exercising treaty rights in the UK at the time that the appellant and his wife divorced.

Error of Law decision

16. The issue of fairness in the context of adjournments was considered by the Upper Tribunal in the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 418**. The President gave the following reminder;

> "7. 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 FtT 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? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.
>
> 8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:
>
> > "First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair".
>
> Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably

> anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focusing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

17. I have no hesitation in saying that the Judge acted reasonably in refusing the application for an adjournment. I note in particular that the appellant had not submitted any witness statement or documents in readiness for the hearing. The appellant's representatives did not inform the Tribunal that they would not be attending the hearing, and that they had in their possession a file of documents capable of demonstrating the wife's employment and address in the UK.

18. The application to adjourn was not made at the earliest opportunity, but left to the morning of the hearing before the First-tier Tribunal. The application was speculative, and in the absence of any confirmation from the appellant's representatives, there was no reasonable basis to presume that the evidence that the appellant claimed exists, does exist, or could be produced within a reasonable period. The application did not show that anything material would be achieved by the delay. At noted at paragraph [6] of the decision, since the appellant had come out of detention he had not received money from his parents to pay his lawyers on time in order at they could attend and represent him at the appeal hearing. The appellant's parents had not been able to find the money for him to be represented at the hearing before the First-tier Tribunal and the appellant had attempted to find money from friends, but to no avail.

19. The Judge refused the application having noted the appellant's claim that his representatives had his files containing documentation which showed proof of his wife's work and her address. The Judge noted that the appellant was unable to give any adequate explanation as to why he had not requested copies of the documents so that he could produce them at the hearing.

20. I pause here to note that following the grant of permission to appeal to the Upper Tribunal, directions were issued to the parties making it clear that the parties shall prepare for the forthcoming hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. The parties were reminded of the need to make an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, where appropriate, and of the requirements of that rule. The appellant has failed to make an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 identifying the nature of the evidence that the appellant seeks to adduce or explaining why such evidence was not submitted to the First-tier Tribunal. If as the appellant had previously claimed, evidence in support of his appeal exists, there is no explanation for the absence of an application under Rule 15(2A) before me.

21. In all of the circumstances it is easy to understand why the Judge refused the application for an adjournment. However, I remind myself that the decision in **Nwaigwe**, makes it clear that the crucial question is not whether the decision of the First-tier Judge was reasonable, but whether the refusal deprived the appellant of his right to a fair hearing.

22. In my judgement, what appears to have been fatal to the application for an adjournment is the divorce certificate sealed by the Ministry of Justice in Cameroon, and dated 18th August 2015. The Judge states at paragraph [9]:

> *"9. The Appellant had presented a certificate of divorce from Cameroon in relation to his wife and it was unclear what the basis for his appeal would be…"*

23. The Judge very clearly had in mind the decision of the European Court of Justice in **Singh and Others –v- Ministry of Justice and Equality [2015] EU ECJ C-218/14** that is referred to at paragraphs [17] and [20] of the Judge's decision. The European Court of Justice held that Under Directive 2004/38, a third-country national who was married to an EU citizen residing in a Member State other than the citizen's own State, could no longer enjoy a right of residence in that State where the EU citizen left that State before the commencement of divorce proceedings. The Court observed that, where divorce proceedings were started and the marriage had lasted for at least three years before the commencement of the divorce proceedings, including at least one year in the host Member State, the foreign spouse may, subject to certain conditions, retain the right of residence in that State on the basis of art.13(2) of the directive, both during the divorce proceedings and after the decree of divorce, provided that at the date of commencement of those proceedings he or she was resident in that State as the spouse of an EU citizen accompanying or joining the citizen in that State. It follows that the EU citizen must reside in the host Member State, in accordance with art.7(1) of the directive, up to the date on which divorce proceedings are commenced. The appellant's own case before the First-tier Tribunal was that the appellant had lived in London with his wife between 2008 and 2015, but he was unable to provide any addresses.

24. As set out at paragraph [22] of the decision of the First-tier Tribunal, the appellant's spouse had left the UK to institute divorce proceedings in Cameroon and so the appellant could not claim a retained right of residence. The appellant lost his right of residence at the time of his former spouse's departure from the UK. The appellant's former spouse, an EU citizen was not residing in the UK in accordance with art.7(1) of the directive, at the date on which divorce proceedings were commenced. Against that background, it was, as set out by the Judge, unclear what the basis for the appellant's appeal would be.

25. In the circumstances, I am satisfied the Judge took account of all material considerations in her decision to refuse the application for an adjournment and I am satisfied that the appellant did not lose his right to a fair hearing. There was in my judgement no procedural unfairness in the decision to refuse to grant the adjournment.

26. It follows that the appeal is dismissed

Notice of Decision

27. The appeal is dismissed and the decision of the First-tier Tribunal stands.

28. No anonymity direction is applied for and none is made.

Signed Date: 14 July 2016

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award. I have dismissed the appellant's appeal and the decision of the First-tier Tribunal stands.

Signed Date: 14 July 2016

Deputy Upper Tribunal Judge Mandalia