Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/14529/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral judgment given at hearing	
On 17 May 2017	**On 10 August 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

PARVINDER SINGH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance by or on behalf of the Appellant
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born in 1984. He made an application on 19 November 2014 for leave to remain as a spouse. That application was refused in a

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decision dated 26 May 2015 alongside a decision to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed against the decisions and the appeal came before First-tier Tribunal Judge Blundell ("the FtJ") at a hearing on 23 September 2016. At that hearing there was no appearance by or on behalf of the appellant and indeed no appearance on behalf of the respondent. Similarly, there is no appearance by or on behalf of the appellant before me today.

3. In relation to the non-attendance of the appellant today, there was an application for an adjournment on the basis that his fiancée is in Mauritius and would be returning to the UK on 16 August 2017. That application was refused by a judge of the Upper Tribunal on 10 May 2017, the refusal having been communicated to the appellant by letter of the same date. There is no indication from the appellant as to why he personally is not able to attend the hearing today. No messages have been received indicating that he is unable to attend for some reason and would otherwise have wanted to.

4. The Upper Tribunal Judge who refused the adjournment stated as her reason that the matter being listed for an error of law hearing, the evidence of the witness is not material. She said that if it were necessary to re-make the decision and hear evidence, the application for an adjournment could be renewed at the hearing.

5. I am satisfied that it is appropriate to proceed in the absence of the appellant pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the overriding objective set out in rule 2. It is plain that the appellant is aware of the hearing today and, as I have indicated, there is nothing from him to suggest that he was unable to attend or that he has any good reason for not attending.

6. The grounds of appeal in relation to the hearing before the FtJ whereby he dismissed the appeal on human rights grounds, are summarised in the grant of permission. The permission judge said as follows, to summarise, namely that it was arguable that the FtJ acted unfairly and deprived the appellant of a fair hearing given that the appellant had made an application on 16 September 2016 to vacate the hearing before the FtJ on the ground that his partner was medically unfit to attend the hearing at that time. The grant of permission states that that application was supported by medical evidence and that the (First-tier) Tribunal had initially refused the application because there was no indication of when the witness would be able to attend, that refusal of the adjournment having been on 19 September 2016. It was therefore arguable, so it is said, that that gave rise to a legitimate expectation that the application would be granted if this issue was addressed.

7. The grant of permission also states that the appellant addressed the issue in the refusal of the adjournment by indicating that his partner would be well enough to attend the hearing if it was listed after 17 November 2016. Thus, it is said to be arguable that the FtJ was wrong to refuse the application for a different reason, namely that the witness could make a witness statement and that there was no

reason why she needed to attend in person. That reason is said to be arguably flawed given that the Tribunal was bound to attach less weight to a written statement than to oral testimony tested by cross-examination.

8. Furthermore, the appellant had subsequently claimed that his partner's medical condition was such that he would need to care for her on the date of the hearing. It was said to be arguable that the FtJ considered the reason given by the appellant for his absence at the hearing only after he had already decided to hear the appeal in absence. This arguably gave rise to an appearance that this was simply providing *ex post facto* reasons for the decision that had already been taken. It was arguable that by that stage the FtJ was *functus officio*.

9. The FtJ noted that despite a request from the Tribunal's administration that the respondent should file and serve a bundle, none was forthcoming. However, he concluded that there was sufficient information from which to determine the appeal in any event.

10. He referred to the application for leave to remain citing the appellant's length of residence in the UK, his relationship with his pet goldfish and his need for ongoing medical treatment in connection with a foot injury.

11. In the appellant's notice of appeal, which the FtJ also summarised, it was said that the sole ground pursued was that the appellant's removal would be unlawful under Article 8 of the ECHR, the appellant relying on his relationship with a Mauritian national (Ms A) whom he had met in 2011 when they both had leave to remain as Tier 4 Migrants, and that they were engaged to be married. She apparently had leave to remain until 31 May 2016 and the grounds stated that the appellant had made his application for leave to remain at a time when Ms A had returned to Mauritius in order to make a further entry clearance application as a result of which he had been unable to rely on their relationship in his application for further leave.

12. It is also recorded by the FtJ that the grounds state that Ms A had re-entered the UK with entry clearance in January 2015 and was studying. Under a heading 'Procedural History' the FtJ said that the appeal was initially listed to be heard in Newport on 8 June 2016 but at the appellant's request, he living in Southall at the time, the hearing was adjourned to a hearing centre nearer to where he lived.

13. The FtJ noted that on 16 September 2016 the appellant had written to the Tribunal asking for the hearing to be adjourned. Ms A had been involved in an armed robbery whilst she was working at Ladbrokes on Finchley Road. Evidence in support of that contention was provided and summarised by the FtJ, the robbery having taken place on 5 September 2016. There was medical evidence to the effect that she was suffering from post traumatic stress disorder and the letter referred to her condition being reviewed in two months' time after which he expected her to be fit to attend court. There was a signed statement from Ms A confirming what the appellant had said and medical evidence from the GP saying that she would be unable to attend the hearing on 23 September. There was also evidence from the

police which supported the contention that there had been that crime on 5 September 2016.

14. The FtJ noted that a designated judge had refused the adjournment on 19 September 2016, stating that there was no indication of when the witness would be able to attend and that the case should proceed on the basis of any witness statement provided by her. The application for an adjournment was renewed by letter dated 20 September 2016. The appellant had said that Ms A would be able to attend the hearing after 17 November 2016 but that it had not been possible to prepare for the hearing because she had not been able to give a witness statement. Again, that application was refused by Designated Judge of the First-tier Tribunal, the reasons being that there was no good reason as to why the witness could not make a witness statement relevant to the facts in issue and that she did not need to attend in person.

15. The hearing before the FtJ was listed as a floating case on 23 September as recorded by the FtJ. There was no appearance by or on behalf of the appellant and the judge stated that he resolved to consider the appeal in his absence. He then stated at [10] of his decision that unbeknownst to him at the time, the appellant had sent a third application for an adjournment and the letter in support of the application for an adjournment was sent to him after he had left the hearing. In the letter the appellant had said that the Tribunal's consideration of his adjournment applications had been "insensitive, unjust and unfair", in that the medical evidence had not been taken into account. It also said that his witness, Ms A, was not in a fit mental state to complete any witness statement because she was suffering from severe PTSD. The appellant also said that he would be unable to attend the hearing as Ms A was his prime focus and that it was not safe to leave her alone. The FtJ recorded that the adjournment application was renewed for those same reasons.

16. At [11] the FtJ said that he considered afresh whether the matter should be adjourned or whether it was in the interests of justice for the appeal to proceed in his absence. He referred specifically to the GP's letter and quoted part of it. He noted at [12] that it was apparent that the letter did not state that she was unable to complete a witness statement. He said that that would have been a surprising suggestion because in fact she made a statement in support of the first adjournment application. He noted that that statement was signed and dated by her. He said that like the designated judge who refused the second application for an adjournment, he did not understand why she was unable to make a witness statement for the purposes of the appeal, nor did he understand why the appellant was unable to attend the hearing.

17. He noted that the appellant lived in Hounslow which is a short distance from the hearing centre and that there was no suggestion in the medical evidence that Ms A, who he said had doubtlessly suffered a very upsetting experience, required round the clock care from the appellant.

18. In further considering the application for an adjournment he referred to the decision in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) and he referred to the overriding objective. He said that the overarching consideration was whether the

appellant would be deprived of his right to a fair hearing. He then said that he had declined to adjourn the hearing. He noted that the respondent's decision was issued 18 months before the hearing and that Counsel had settled the grounds of appeal to the Tribunal in April 2015 informing the Tribunal that reliance was to be placed on the appellant's relationship with Ms A.

19. Crucially in my judgement, he said that since then the appellant had filed and served nothing whatsoever apart from the adjournment requests to which he had referred. There was no statement from Ms A in support of the appeal and there was only the statement she prepared in support of the adjournment application. There was no indication, much less any proof, that Ms A had renewed her leave to remain in the United Kingdom.

20. He also recalled that in the grounds of appeal settled by counsel, she had leave until May 2016 but there was no evidence to show as to how the appellant contended that the requirements of the Immigration Rules could be met or how his removal would be a breach of Article 8 of the ECHR.

21. He said at [14] that he had every sympathy for Ms A and accepted without question the medical evidence which states that she was unable to attend the hearing, but the fact that a witness is unable to attend does not mean, without more, that the Tribunal should adjourn the hearing.

22. He stated that having considered all the circumstances, but not least the absence of an adequate reason for the appellant's non-attendance, and the absence of any preparation being undertaken in the 18 months before the listing of the appeal, he concluded that the overriding objective favoured proceeding with the appeal in the absence of the appellant.

23. He then considered Article 8 of the ECHR. He noted that the appellant did not contend that he met the requirements of the Immigration Rules in any respect, in particular in relation to paragraph 276ADE(1). He also said that the appellant did not seemingly contend that his relationship with Ms A was such as to satisfy the Rules which accommodate the partners of relevant points-based system migrants. He had only contended that removal would be a disproportionate interference with their right to family life together.

24. In the following paragraph he said that he was prepared to assume for the purposes of his decision that the appellant and Ms A are engaged to be married and that their relationship is a genuine and subsisting one. However, even assuming that to be the case, he said that the Article 8 case was bound to fail at the first hurdle because of the appellant's failure to file any evidence in support of the appeal during the months that it had been pending.

25. He stated that there was no evidence to show what Ms A's present immigration status was. No reason was given as to why the appellant could not enjoy his family life with her in either Mauritius or India, and he concluded that it was very clear from the authorities that it would be a rare case that succeeded under Article 8 where

there are no insurmountable obstacles to the continuation of family life abroad, citing the decision in *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440. This was not an example of a case where there were such insurmountable obstacles. He concluded that there was no indication within the grounds, or in any other aspect in the material that was before him, that there might be compelling circumstances such that absent insurmountable obstacles this appeal should be allowed.

26. He then referred to s.117B of the Nationality, Immigration and Asylum Act 2002 and the factors that need to be taken into account in that respect under Article 8. He resolved certain matters in favour of the appellant, for example that the appellant was not in the UK unlawfully when his family life with Ms A started but he did nevertheless refer to the 'precariousness' issue which was a relevant factor to take into account.

27. He found that there was nothing to show that the appellant and his fiancé are financially independent which was a factor against them, or that they were able to speak English to the requisite standard. He concluded that there was simply no proper basis upon which the Tribunal could conceivably accept that the appellant's removal would be a disproportionate interference with any family life which might exist between him and Ms A. He further concluded that the appellant would obviously prefer to stay in the UK with his partner until she completed her studies but Article 8 did not provide an entitlement to choose the country in which family life continues, and does not in this case render his removal unlawful under Section 6 of the Human Rights Act 1998.

28. In submissions on behalf of the respondent before me, Mr Clarke relied on the 'rule 24' response. Up-to-date information was provided in the form of a printout from the respondent's records indicating that Ms A had voluntarily returned to Mauritius on 4 March 2017. It is apparent that that information does relate to her because the date of birth is the same on the record as on the documents provided in the Tribunal's file, in particular her passport. The middle name is also the same. It was not clear therefore, how she could in any event be able to come back to the UK, in particular in terms of her appearance at any hearing. It was submitted, to summarise, that the FtJ had considered every aspect of the adjournment application, had properly applied the overriding objective but was entitled to take into account the lack of evidence provided by the appellant in support of the appeal.

29. I am satisfied that the FtJ's consideration of the application for an adjournment is free from any error of law. The FtJ plainly had in mind the overriding objective. He took into account all the circumstances. It is not the case, as the grounds of appeal suggest or imply, that the FtJ overlooked the seriousness of Ms A's condition and the evidence suggesting that she is suffering from PTSD. The FtJ expressly stated that he accepted that medical evidence, for example at [14]. He was perfectly entitled, and indeed bound, to take into account that Ms A had in fact prepared a witness statement which she had signed and dated relatively recently before the hearing in support of the application for an adjournment. He was entitled to find therefore, that

there was no basis from which to conclude that she could not make a statement in support of the appeal.

30. He also took into account, quite properly, the fact that there was absolutely no evidence from the appellant in support of the contention that his removal would amount to a disproportionate interference with their family life. As I have indicated, at [13] he said that the appellant had filed and served nothing whatsoever apart from the adjournment requests, and indeed that is still the position as at the date of the hearing before me today.

31. The FtJ referred to the absence of any preparation being undertaken in the 18 months before the substantive listing of the appeal. No question of legitimate expectation arose in terms of the previous refusal of the application for an adjournment stating that there was no indication as to when Ms A would be well enough to attend a hearing. Each application for an adjournment has to be considered on its own merits and there was nothing to suggest that it was held out to the appellant that if that matter was addressed, an adjournment of the hearing would be granted.

32. The FtJ considered every aspect of the appeal in terms of the evidence that was before him and came to conclusions that were fully justified on the evidence. There simply was no basis upon which the appeal could be allowed, and the adjournment issue was dealt with entirely properly by the FtJ.

33. In all those circumstances, I am not satisfied that there is any error of law in the decision of the FtJ. The decision of the First-tier Tribunal to dismiss the appeal therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 30/06/17