Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07546/2016

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 28th January 2019	**On 20th February 2019**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MR SHAFAYHAT ANWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Hossain, Solicitor of City Heights Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh seeking to make an application under the Immigration (EEA) Regulations 2006 for an EEA residence card as an extended family member of an EEA national, namely the sponsor. The application was refused by a decision dated 24th December 2015.

2. The appellant appealed against that decision. Initially, by reason of the decision in **Sala,** the First-tier Tribunal was not able to accept jurisdiction but that position changed. Thus it was that the First-tier Tribunal became

able to deal with such applications and on 6th November 2018 the appeal came for hearing before First-tier Tribunal Judge Watson.

3. At the hearing an application was made for an adjournment on the basis that the sponsor was unwell and unable to attend. In the event an adjournment was not granted and the case proceeded. The Judge in a detailed determination found the evidence of relationship with the sponsor to be unsatisfactory and that the evidence relating to dependency also unsatisfactory. Accordingly the application was dismissed.

4. The appellant seeks to challenge that decision on the basis of unfairness that an adjournment ought to have been granted in order for his key witness to be able to attend. Permission to appeal to the Upper Tribunal was granted on that matter. It is this matter which comes before me to determine the issue.

5. The Judge records the application for an adjournment at paragraph 3 of the determination in this way:-

> "The sponsor did not attend. The appellant's representative stated that the sponsor was suffering from diarrhoea and was unable to attend. He made an application for an adjournment. I offered more time for the sponsor to be contacted and for medical evidence to be produced but the respondent did not wish for the case to be put back to the afternoon and I refused the application for a longer adjournment and proceeded to hear the case. I decided that further delay was not in the interests of justice and that offering further time on the day to allow the sponsor to attend or produce medical evidence for his non-appearance was appropriate and proportionate in the circumstances and in accordance with the overriding objective Rule 2 of the Tribunal Procedure Rules."

6. Mr Hossain in his submissions relies upon the decision of the Upper Tribunal in **Nwaigwe (Adjournment: fairness) [2014] UKUT 00418 (IAC)**.

7. The decision highlights that the Tribunal should act fairly rather than reasonably.

8. That was a case in which the appellant did not appear rather than a witness. It was made clear that the Asylum and Immigration Tribunal (Procedure) Rules 2005 should be construed and applied by reference to the overriding objective enshrined in Rule 4, which provides:-

> "The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and where appropriate that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest."

9. The Tribunal went on to indicate where a party applies for an adjournment of the hearing, the Tribunal is obliged, in every case, to consider whether

the appeal can be "justly determined" in the moving party's absence. The Tribunal went on in paragraph 5 to say as follows:-

> "This means that in principle there may be cases where an adjournment should be ordered notwithstanding that the moving party has failed to demonstrate good reason for this course. As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right to every litigant to a fair hearing, is engaged."

10. The Tribunal went on in paragraph 6 to say as follows:-

> "In cases where the Tribunal considers that an adjournment application is based on spurious or frivolous grounds or is vexatious, the requirement of demonstrating good reason will not be satisfied. However, this will not be determinative of the question of whether refusing an adjournment request would compromise the right to a fair hearing of the party concerned. 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. Tribunals should be very slow to conclude that the party concerned has waived its right to a fair hearing or any discrete aspect thereof. Where any suggestion of this kind arises, it will be preferable to evaluate the conduct of the party concerned through the lens of abuse of process and it will always be necessary to give effect to both parties' right to a fair hearing."

11. The Tribunal went on to recognise the pressure and demands of workloads and time constraints but indicated "in determining applications for adjournments, Judges will always be guided by focusing on the overarching criterion enshrined in the overriding objective, which is that of fairness".

12. It seems to me that this matter has two overriding concerns. The first is whether the Judge acted fairly in refusing the adjournment and secondly whether there is a lack of fairness or perceived fairness resulting therefrom.

13. It is important for the Judge to bear in mind the need to progress the appeal particularly as it had been waiting for so many years to be heard. No doubt there would have been a significant delay from listing to hearing in any event.

14. The Judge did not dismiss the application out of hand but offered more time for the sponsor to be contacted and for medical evidence to be produced. The simple statement that on the morning the sponsor was suffering from diarrhoea gives little indication as to the state of health generally of the sponsor. It is not clear for example whether he had been unwell for some time or whether this was an affliction that had suddenly

come upon him. If the latter it may be reasonable to consider whether that condition would have improved in the course of the day. There has been no further clarification as to the health of the sponsor in support of this appeal. Indeed I note that the sponsor attended with the appellant at the hearing before me. I invited Mr Hossein to clarify what had been the overall problem with the sponsor's health at the time but received little clarification from my question other than that diarrhoea was enough and that it was not reasonable to expect a medical certificate to be produced for that ailment. I find such to be singularly unhelpful in the context of this appeal. It was clear that the Judge was motivated to try and find out more about the problem and if possible to see whether the sponsor could attend in the afternoon.

15. For my part I find nothing wrong with that approach. The Judge clearly had taken the matter seriously and wanted further information from the sponsor concerning the difficulty.

16. For whatever reason the representative did not wish for the case to be put back to the afternoon. It is not entirely clear why. In the event, given that the matter was not further clarified nor the offer to do so taken up, it is entirely understandable why the Judge proceeded to hear the case. There needs to be a balance between the interests of the appellant and the interests of justice to get a timely hearing of the issue. I find no criticism of the Judge nor any unfairness in the Judge's approach.

17. However there is a wider consideration, as was made clear in the decision of **Nwaigwe**, namely the overall fairness of procedures and/or the perceived fairness.

18. In terms of relationship with the sponsor the Judge found the evidence relating to that to be wholly unsatisfactory. The sponsor is variously described as nephew, cousin and distant cousin and that there are various nationality certificates largely unexplained.

19. The Judge at paragraph 21 said as follows:-

> "I find that the appellant has not shown on the balance of probabilities that he is related to the sponsor as claimed. The sponsor did not attend for cross examination so that the relationship could be examined and the production of four nationality certificates are not sufficient to show me the claimed relationship."

Clearly by such remarks the Judge would seem to accept that the presence of the sponsor may have been of assistance in clarifying issues.

20. In terms of dependency the Judge looked at a number of documents and concluded understandably that they did not support the case as advanced. The Judges concludes at paragraph 27 in these terms:-

> "There was no satisfactory evidence of current dependency. The appellant's oral evidence was that the sponsor would send cash to him via friends who travelled from Sweden to Bangladesh and that he gives

> cash to him now and since he has been in the UK. There is no supporting documentary evidence in the form of bank statements or other witnesses. The one bank statement produced comes nowhere near the necessary level of proof to show a dependency and his assertion in oral evidence and in the witness statement that the sponsor gives him food and pocket money now is unsupported in any way and I do not find it likely given the whole of the evidence before me."

21. It is entirely obvious that from first to last the sponsor is the key witness for the appellant and the chief source of evidence or clarification on his behalf. The absence of the sponsor is specifically referred to in the analysis of the evidence.

22. As I have indicated, it remains unclear why the representative was not willing to spend some time to clarify the situation with the sponsor and to ascertain whether he could come later in the day or indeed to clarify the full nature of his disability. Had that time been taken it may well be that the Judge might have been persuaded with a cogent account of the sponsor's difficulties to adjourn or not. It is not the convenience of the representative that is important in such hearings but the fairness to represent the interests of the appellant. It seems to me that, prima facie, the reluctance of the representative to accede to the request of the Judge to delay matters for investigation was wholly unreasonable and unjustified.

23. That being said, it is not for the appellant to be prejudiced by the actions of his representative, particularly as matters evolved at the hearing it would have been potentially of significance for the sponsor to have attended to give evidence. Given the centrality of the sponsor to the case as presented it is understandable that there may be a perceived feeling of unfairness on the part of the appellant by reason of the sponsor not being there.

24. Following the indication of the case of **Nwaigwe** it does seem that fairness is an overriding criteria in these matters.

25. Given the fact that the Judge expressed the concern that, had the sponsor been present, there may have been some clarification with the evidence, it seems to me that on the basis of overall fairness of the proceedings and certainly upon the basis that justice should be seen to be done as well as being done, I with some reluctance uphold the concerns that have been expressed. Given those circumstances the decision of the First-tier Tribunal shall be set aside in order for there to be a full hearing of matters with the sponsor present.

26. In the circumstances therefore the appellant's appeal before the Upper Tribunal succeeds. The decision of the First-tier Tribunal should be set aside to be remade by the First-tier Tribunal at a de novo hearing.

No anonymity direction is made.

Signed  Date 18 Feb 2019

Upper Tribunal Judge King TD