Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01646/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 February 2019	**On 05 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

HP (INDIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person.
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals on procedural fairness grounds from the decision of the First-tier Tribunal (Judge Farrelly sitting at Taylor House on 5 September 2018) dismissing her appeal against the decision of the Secretary of State for the Home Department ("the Department") to refuse to grant her indefinite leave to remain on the grounds of 10 years' continuous lawful residence. The First-tier Tribunal did not make an anonymity direction, but as the appellant's state of health at the time of the hearing is a central issue in this appeal to the Upper Tribunal, I consider that an anonymity direction is warranted.

Relevant Background

2. The appellant is a national of India, whose date of birth is 24 May 1985. She arrived in the United Kingdom on 22 April 2009 with valid entry clearance as a student. She was granted limited leave to remain as a student, and in due course was granted leave to remain as a Tier 1 (Post-study work) migrant. On 8 August 2013 she made an in-time application for leave to remain as a Tier 1 Entrepreneur, and she was granted leave to remain in this capacity until 19 May 2017.

3. On 14 May 2017 the appellant applied for indefinite leave to remain on the basis of 10 years' lawful residence, although she had not yet reached the 10-year watershed. The background to this was that her business had foundered due to the exit of her business partner, and the appellant was unable to meet the requirements of the Rules to extend her leave to remain in the capacity of a Tier 1 Entrepreneur. Her legal representatives, Westbrook Law, said in their covering letter of 12 May 2017: "*her business partner made a rough exit from the business, where [HP] was put in limbo.*" On that basis, Westbrook Law invited the respondent to grant her indefinite leave to remain on the grounds that there were truly exceptional circumstances in her case.

4. On 14 December 2014 the Department gave their reasons for refusing the application. She had not accrued 10 years' continuous lawful residence, and so she did not qualify for indefinite leave to remain. She did not qualify in the alternative for leave to remain under Rule 276ADE(1)(iv). Her parents continued to reside in India, and she had visited India in 2012. She could utilise the skills that she had acquired in the UK to assist her in securing employment or establishing a business in her home country in order to support herself. She had been educated to a high level in the UK, having obtained a Masters in Business Administration from Liverpool John Moores University.

5. In the grounds of appeal to the First-tier Tribunal, the case that was advanced was that the decision of the Department was unreasonable.

6. By a notice dated 29 January 2018, the appellant and Westbrook Law were notified that the appeal would be heard on 29 August 2018 at Taylor House. On 21 August 2018 Westbrook Law sent a letter to the Tribunal requesting an adjournment on the ground that the appellant suffered from depression and had mental health issues. In support of this, they submitted a sick note from her GP who said that she had seen the appellant on 13 August 2018 for abdominal pain, and that the appellant was awaiting gynaecological investigations. A First-tier Tribunal Judge considered the adjournment application, and refused it on the basis that the GP note made no reference to any mental health issues and did not say that the appellant would be unfit to attend. A notice of decision was sent by letter dated 24 August 2018.

7. It is not disputed that Westbrook Law and the appellant received this notice in advance of the hearing scheduled for 29 August 2018. The way it is put in the application for permission is that, after the adjournment

request was refused, the appellant *"failed to instruct"* her legal representatives to attend the hearing on 29 August 2018.

The Decision of the First-tier Tribunal

8. The hearing did not in the event go ahead on that day. Instead, the appeal hearing was re-listed for 5 September 2018. In his subsequent decision, Judge Farrelly observed that there was no note on the file as to why it did not proceed on 29 August 2018, or if any further notification was sent. But there was nothing to suggest that the appellant or her representative attended on 29 August 2018 or made any further enquiries as to the outcome of the listed hearing. On the basis that the appellant had been advised of the hearing and had failed without good reason to attend, he had decided to proceed. The Judge went on to assess the appeal on the merits, and found that the decision of the Department was reasonable and proportionate.

The Application for Permission to Appeal

9. The application for permission to appeal to the Upper Tribunal was settled by the appellant's legal representatives. They pleaded that the decision had been taken deceitful without considering the appellant's medical condition and without having any regard to her medical notes "*as she was not mentally prepared to stand in a court to provide any pieces of evidence if needed."* She was undergoing persistent gynaecological issues due to which she had been undergoing stress and depression. When she had requested a sick note from her GP, she was only given one based on the main issues - namely her stomach pain - but it failed to mention her depression. A request for an adjournment was sent similarly on 5 September 2018.

The Reasons for the Initial Refusal of Permission

10. On 21 November 2018 Designated Judge Woodcraft refused permission to appeal for the following reasons:

> "The grounds of onward appeal argue that due to her ill health the appellant was unable to instruct a representative to attend the hearing on [29] August 2018. The appellant was given 7 months' notice of that hearing, and sufficient time to instruct someone to represent her whatever her medical condition. That appeal date was in turn adjourned giving the appellant some extra time. On the basis of the appellant having been advised of the new date, 5 September 2018, but had failed to attend without giving good reason, the Judge decided to proceed as was open to him. Even now the medical certificate produced by the appellant merely shows that she was not fit to work, which is not the same as saying that she was unfit to attend court.
>
> The remainder of the grounds repeat the appellant's arguments in relation to her private life, but as the Judge pointed out at [12], the appellant's status is precarious and little weight could therefore be given to it in the balancing exercise outside the Rules. The grounds

> amount to no more than a disagreement with the result [and] they do not demonstrate any arguable error of law on the Judge's part."

The Reasons for the Eventual Grant for Permission

11. Following a renewed application for permission to appeal to the Upper Tribunal, (also settled by the appellant's legal representatives) Upper Tribunal Judge Grubb granted permission to appeal for the following reasons:

> "An arguable procedural error has occurred. The appeal was initially listed for hearing on 29 August 2018. Her application to adjourn that hearing was refused. However, the hearing did not proceed on that date but was, instead, listed before Judge Farrelly on 5 September 2018. He proceeded to hear the appeal with neither party in attendance but no notice of a re-listed hearing appears to have been sent. The Judge noted that he could see no such notice at [6]. If the appeal was to be listed on a different date from 29 August 2018, in the absence of a further notice of hearing, the appellant was denied an opportunity to attend on that new date. That is arguably a procedural error amounting to unfairness."

Discussion

12. The first question which arises is whether the true factual matrix is that apprehended by Judge Grubb or that apprehended by Judge Woodcraft. While it appears that no formal notice of hearing was issued in respect of the hearing on 5 September 2018, it is likely that Westbrook Law were notified of the re-listed hearing on 5 September 2018 in advance of it taking place. My reasoning on this issue is two-fold. Firstly, if they had not been notified of the re-listing of the hearing on 5 September 2018, I would have expected the absence of notice to be a ground of appeal in the permission application settled by Westbrook Law. But I cannot find a complaint about non-notification of the new hearing date in either the permission application to the First-tier Tribunal or in the renewed application for permission to the Upper Tribunal. Secondly, and in any event, they pleaded that a request for an adjournment was "*sent similarly on 5 September 2018".* The plain implication of this is that they were aware of the hearing being re-listed on that date, and in response they renewed the request for an adjournment which they had made in respect of the earlier listed hearing on 29 August 2018.

13. I accept that there is no specific evidence of this, beyond what is stated in the permission application. But the fact remains that, not only are the appellant's former representatives not complaining of an absence of notice of the hearing on 5 September 2018, but the case they are advancing by way of appeal to the Upper Tribunal is that they were aware of the hearing on 5 September 2018 before it took place. Their complaint, on behalf of their client, is not the absence of notice of the hearing being re-listed on 5 September 2018, but the fact that it went ahead despite the appellant's medical condition.

14. But even if I am wrong about the absence of notice for the hearing on 5 September 2018, I do not consider on the particular facts of this case that the appellant has been the victim of procedural unfairness or irregularity.

15. Firstly, she has not made out a case on the medical evidence provided by way of appeal to the Upper Tribunal that she was unfit to attend the hearing on either 29 August or 5 September as a witness or as an observer - she was not a litigant in person. Secondly, it is clear that neither she nor her representatives would have attended on 5 September 2018 in any circumstances. As of 5 September 2018 the appellant continued to consider that she was too unwell to attend a hearing, and she continued to be unwilling to instruct Westbrook Law to present her case in her absence.

16. Thirdly, by her earlier conduct I consider that the appellant can be said to have waived her right to an oral hearing, and to have consented to her appeal being disposed of in her absence. Both the appellant and her legal representatives were aware in advance of the hearing listed for 29 August that the adjournment request on medical grounds had been refused. In the circumstances, the appellant ought to have attended on 29 August 2018 and ought to have instructed her representatives to attend with her to present her case. But she chose neither to attend herself nor to instruct Westbrook Law to attend for the oral hearing which was scheduled to take place. Accordingly, she was constructively content for the hearing to proceed in her absence and in the absence of her legal representatives. In the circumstances, she was not remotely disadvantaged by the fact that the hearing in her absence took place some days later instead.

17. The position might be different if the appellant had recovered sufficiently such that she felt she could have attended the hearing on 5 September 2018 if she had known about it. But that is not her case. Her case is that the hearing should not have gone ahead on either 29 August 2018 or 5 September 2018 because of her continuing ill health.

18. However, as noted by Judge Woodcraft, the sick note issued on 30 October 2018 does not confirm that the appellant was unfit to attend the hearing of her appeal in August or September 2018. Also, it does not confirm that the appellant was suffering from depression and stress at the end of August or the beginning of September 2018, as opposed to suffering from depression and stress on the date of assessment, which was on 30 October 2018.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 18 February 2019

Deputy Upper Tribunal Judge Monson