Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01016/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 April 2019	**On 24 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SOFIA IDD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Alastair Mackenzie, Counsel instructed by TRP Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal from the decision of the First-tier Tribunal (which was promulgated on or about 20 March 2017) on the ground that it is arguable that, in failing to consider whether her appeal against the refusal of ILR could be determined fairly and justly without her husband being given the opportunity to be heard, the First-tier Tribunal Judge denied the appellant the opportunity of a full and fair hearing.

Relevant Background

2. The appellant is a national of Somalia, whose date of birth is 10 October 1982. On 8 February 2009 she married her husband, Hussain Hassan, in Uganda. At the time, Mr Hasan was a Somali national who had been granted refugee status in the UK. Mr Hassan has since become a British citizen.

3. The appellant arrived in the UK from Uganda on 18 November 2011 with valid entry clearance as the spouse of a person of a person present and settled here. On 27 December 2012 she applied for leave to remain as a spouse. As evidence that she met the English language requirement, she submitted a TOEIC certificate in speaking and listening from ETS in respect of a test purportedly undertaken by her at a test centre on 16 October 2012. She was granted further leave to remain as a spouse until 8 March 2015. On 30 July 2014 the appellant applied for indefinite leave to remain as a spouse.

4. On 10 February 2016 the Secretary of State for the Home Department ("the Department") gave their reasons for refusing her application. In an interview of 14 September 2015 (the transcript of which is in Section D of the Home Office bundle) she had explained that she was aware that part of her TOEIC test on 16 October 2012 had been completed on her behalf. She had failed to inform the authorities of this, and so she had admitted that there was an element of deception in her acquisition of the TOEIC certificate.

5. ETS had a record of her speaking test. Using voice verification software, ETS was able to detect when a single person was undertaking multiple tests. ETS had via the use of computer voice recognition software, and a further human review by anti-fraud staff, undertaken a check of her test and had confirmed to the Department that there was significant evidence to conclude that her certificate was fraudulently obtained by the use of a proxy test-taker. Her scores from the test taken on 16 October 2012 at BIETTEC had now been cancelled by ETS. On the basis of information provided by ETS, the Department was satisfied that the certificate was fraudulently obtained and that she had used deception in her application of 27 December 2012.

6. Accordingly, the Department was satisfied that her presence in the UK was not conducive to the public good, because her conduct made it undesirable to allow her to remain in the UK.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. The appellant's appeal came before Judge Birk sitting at Birmingham on 8 March 2017. Both parties were legally represented. Mr "Y" is described in the Judge's decision as the appellant's Legal Representative, but he was apparently a Barrister. In any event, that was how he introduced himself to the appellant, according to her witness statement served with the application for permission to appeal. Mr Y was engaged by the appellant's solicitors to present the appellant's case at the hearing before the Judge. He presented to the Judge a typed skeleton argument in which he said

that evidence had just emerged of "Mr Idd" suffering a stroke prior to the hearing, and in which he invited the Judge to exercise discretion in the Article 8 ECHR proportionality assessment, *"given the impact a refusal could have on the family following Mr Idd's deteriorating health".*

8. The bundle of documents filed by the appellant's solicitors for the hearing included an unsigned witness statement from Mr Hassan. In this witness statement, Mr Hassan said that his spouse was a genuine and honest person. When she had sat the TOEIC test he thought that finally she could apply for leave to remain and they could continue their lives as a couple without constantly worrying about her immigration situation. He believed that his wife was proficient in English, and the fact that she had obtained many certificates, including Life in the UK, further highlighted her ability to pass exams in English.

9. At paragraph [4] of his subsequent decision, Judge Birk said:

> "The Appellant's husband … had provided an unsigned witness statement and was intending to attend the hearing as a witness in support of the Appellant. The medical documentation shows he was admitted to hospital on 2.3.17 and was unable to attend any meetings or appointments in the coming weeks. The medical evidence is that he has had a stroke and will be unable to be fit for work for 6 weeks. On that basis I do place some weight on his evidence even though the statement is unsigned and he cannot attend the hearing due to an unforeseen medical emergency."

10. The appellant was called as a witness, and she adopted as her evidence in chief her signed witness statement. She confirmed that she sat the TOEIC test as a genuine student. She had received two papers back from the test centre. The aspect of the TOEIC that she had sat and which she had submitted to the Home Office was genuinely done by her. Anything that was not done by her she did not acknowledge, as she was an honest person.

11. Mr Y asked her supplementary questions about her taking of the test. According to paragraph [8] of the Judge's decision, she said that she had taken the test over two days. She had taken Speaking and Listening on the first day, and on the second day she had embarked on a Writing test, but had not been allowed to complete it. She had answered 1 or 2 questions and then had left. She was subsequently given three test results. She had taken the first and second results, but had ripped up the third one in front of the Receptionist. She had submitted the Speaking, Listening and Writing test results, but had not submitted the Reading test result.

12. In cross-examination, she repeated that the test had been taken over two days. The Writing test was on the second day. When she went to collect her results, the Receptionist told her that she had an A in Writing and a B in Reading.

13. At paragraphs [16] to [18], the Judge gave his reasons for finding that the Department had discharged both the legal and evidential burdens placed

upon them to show that the appellant had deliberately presented a false document. The appellant had provided detailed evidence at the hearing that the test took place over two days. She confirmed this several times in the course of her evidence. But, in her interview she said it took one day, and the test results also set out the date of the test as being 16 October 2012. As she had stated in her interview and at the hearing, the appellant was aware that there was some wrong-doing at the test centre. She said (in her witness statement) that when she went back to the college, they had given her two "*papers",* whereas in her oral evidence she stated that she was given three "*papers".* The Judge held that her account had significant discrepancies and so she had not provided a credible or plausible explanation.

14. The Judge went on to address Article 8 ECHR. He found there was family life between the appellant and Mr Hassan. He had suffered a stroke and it was not clear at the moment what his medical requirements were going to be; and whether or not these could be met elsewhere. He was therefore unable to conclude that the appellant was required to remain in the UK to look after him. The Judge went on to dismiss the appeal.

Subsequent Developments

15. No application for permission to appeal was made within the time limit. Instead, her solicitors advised her to make further submissions to the Department for leave to remain, which was done on 27 July 2017. But, the Department refused to treat them as a fresh claim and so rejected them on that basis. This decision was communicated to the appellant's solicitors on 8 November 2018.

16. The appellant instructed new solicitors, who made a formal complaint to her previous solicitors in a letter dated 5 December 2018, which Mr Mackenzie produced at my request, together with the response to the complaint. The formal complaint asserted that the previous solicitors had provided inadequate professional services by failing to apply for an adjournment of the hearing on 8 March 2017, and by failing to apply for permission to appeal against the First-tier Tribunal Judge's decision to dismiss the appeal.

17. On 19 December 2018 Mr Mackenzie settled an application for permission to appeal to the Upper Tribunal on the ground that the proceedings before the First-tier Tribunal were unfair because the hearing should have been adjourned after the appellant's husband had been admitted to hospital. He also sought an extension of time on the basis that the appellant was wrongly advised by her then solicitors to make a fresh application, instead of seeking permission to appeal.

18. On 8 January 2019, First-tier Tribunal Judge Bird gave her reasons for extending time and granting permission to appeal. She found that the delay in appealing might well be the fault of her former legal representatives, who did not provide her with the right advice. She

granted permission to appeal on the ground set out in Paragraph [1] above.

19. By letter dated 10 January 2019, the appellant's former solicitors responded to the complaint. On the matter of seeking adjournment, they said that they were instructed by the appellant that she wished to proceed with the hearing, in her own words, "*to get it over with".* Also, on the day of the hearing, when asked how she felt, she said that she was fine as she did not believe that she had done anything wrong. Moreover, a solicitor was only allowed to seek an adjournment, where he did not have the consent of the lay client to do so, if the solicitor genuinely believed that the lay client lacked capacity to act. The appellant clearly had capacity at the time she instructed the firm to continue with the hearing. A solicitor was also under a duty not to mislead the Court in accordance with the Code of Conduct under the SRA Guidance.

20. It would have clearly disadvantaged the appellant if they had advised her to seek an adjournment solely based upon her partner having a stroke - especially as there was no update on the severity of his stroke. The chances of success would have been greatly diminished if her husband made a reasonable recovery or even died from his stroke. The appellant would have failed the Article 8 aspect of her claim if her partner had passed away, or if he had made a reasonable recovery by the time of the next hearing being listed. Therefore, to state that they had not served the appellant's best interests was nonsensical.

The Hearing in the Upper Tribunal

21. At the outset of the hearing before me to determine whether an error of law was made out, Mr Mackenzie produced the complaint and the response at my request. After reviewing their contents, Mr Whitwell applied for an adjournment on the ground that the issue of procedural fairness could not be fairly determined by the Upper Tribunal until an appropriate body had ruled on the question of whether the previous solicitors had been negligent in failing to give the appellant correct advice or in failing to seek an adjournment. After hearing from Mr Mackenzie, I ruled against the grant of an adjournment for two reasons.

22. Firstly, the grant of permission to appeal had not been contingent upon the complaint against the previous solicitors being made good. Secondly, Mr Mackenzie clarified that he was not relying on the asserted negligence of the previous solicitors for the purpose of making good the submission that, as he put it in the grounds of appeal, "*[i]t is obvious from the face of the FtT judgment that the hearing was unfair."*

23. In line with paragraph 17 of the pleaded grounds, Mr Mackenzie submitted that there were three "*obvious"* reasons why Mr Hassan's ill health affected the proceedings, and hence why the hearing ought to have been adjourned. The first was the obvious prospect that he might need the appellant's care and attention in the UK following his stroke. Secondly, her concern for her husband would inevitably be uppermost in the

appellant's mind and so had the potential at least to affect the quality of her evidence. Thirdly, Mr Hassan's evidence was capable of corroborating the appellant's account on the factual matters in dispute, including whether she had used deception as alleged by the Department.

24. In support of the case that there had been no procedural unfairness, Mr Whitwell produced the Presenting Officer's typed record of the proceedings, which I arranged to have copied. He submitted that in circumstances where no adjournment had been requested, the Judge would have been criticised for unilaterally adjourning the appeal for an uncertain period, when there was no specific date for when the husband would be fit to attend. In any event, the husband's view of his wife's English language ability was irrelevant, as he was not an expert. Moreover, as shown by the case of **MA (Nigeria)**, people used proxy test-takers even when they had the ability to pass the test.

Discussion

25. As submitted by Mr Mackenzie, fairness is an objective test, and it is not to be determined solely on the basis of what the lower court or tribunal knew at any given time. Also, where the solicitors make errors, the client in an immigration case is *"not necessarily fixed with her or his solicitors' errors in seeking to oppose removal from the United Kingdom, at least when the client has been in no way responsible for them"*: **R v IAT ex parte Tofik [2003] EWCA Civ 1138** at **[25]**.

26. In **MM (Unfairness: E&R) Sudan [2014] UKUT 00105 (IAC)**, which is one of the authorities drawn to my attention by Mr Mackenzie, the Tribunal affirmed that a successful appeal is not dependent on the demonstration of some failing on the part of the FtT. An error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness. The authorities discussed in **MM** include **E&R -v- SSHD [2004] EWCA Civ 49**, and **R -v- Criminal Injuries Compensation Board, Ex-parte A [1999] 2AC 330**. At paragraph [63] of **E&R**, Carnwath LJ said:

> "In our view, the CICB case points to the way to a separate ground of review, based on the principle of fairness … the unfairness arose from the combination of five factors:
>
> (i) An erroneous impression created by mistake as to, or ignorance of, a relevant fact (availability of reliable evidence to support her case);
>
> (ii) The fact was "established" in the sense that, it attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;
>
> (iii) The Claimant could not fairly be held responsible for the error;

(iv) Although there was no duty on the Board itself, or the police, to do the Claimant's work of proving her case, all the participants had a shared interest in cooperating to achieve the correct result;

(v) The mistaken impression played a material part in the reasoning."

27. Mr Mackenzie does not put the case on an **E&R** basis, but the principles developed in the **E&R** line of jurisprudence are helpful in testing the case as it is put in the grounds of appeal. On analysis, there are two threads to it. The first thread is that behind the scenes, and hence unknown to the Judge, the appellant was inadequately advised by her solicitors, with the consequence that an adjournment of the hearing was not sought, as it ought to have been. There is a dispute of fact between the appellant and the solicitors as to the exchanges between them which took place before the hearing. However, I am not required to attempt to resolve this dispute, as Mr Mackenzie does not rely on this first thread as establishing that the hearing was unfair.

28. The second thread is that, irrespective of the fact that the appellant's legal representatives did not apply for an adjournment, fairness demanded that the Judge should have adjourned the hearing on his own motion.

29. To make good this case, Mr Mackenzie does not rely on any evidence, whether contentious or uncontentious, which was not before the Judge, with the arguable exception of the appellant's evidence in her witness statement that when giving evidence, *"[m]y mind was of course occupied with thoughts of my husband".* But even this is said to have been obviously foreseeable by the Judge, and hence one of the reasons why fairness demanded that he adjourn the hearing of his own motion.

Whether material evidence not taken into account

30. Since the Judge did not exclude Mr Hassan's evidence on the grounds that his witness statement was unsigned, it cannot be said that material evidence relevant to the appeal was not considered by the First-tier Tribunal. The Judge specifically stated that he was going to attach some weight to his evidence, and there is no reason to suppose that he did not do so. Mr Hassan did not condescend to any detail in his witness statement to the circumstances surrounding his wife's taking of the test, and he did not purport to comment specifically on her level of ability at the time when the test was taken. Her evidence at interview was that she had not done any English Language course preparatory to taking the TOEIC test, and Mr Hassan did not gainsay this in his witness statement. He affirmed that the appellant was proficient in English and able to pass exams in English. But objectively this added nothing to what was apparent from the documents contained in the appellant's bundle, which showed that the appellant had passed various exams in English some years later.

31. It is arguable that the Judge implicitly placed less weight on the evidence of Mr Hassan than he would have done if Mr Hassan had attended in

person, but objectively Mr Hassan's evidence on the core issue of deception was of little inherent probative value.

Whether the quality of the appellant's evidence was affected

32. Mr Mackenzie submits that concern for her husband would have been uppermost in the appellant's mind and this had the potential at least to affect the quality of her evidence. However, in her witness statement for the appeal to the Upper Tribunal, the appellant does not actually claim that the discrepancies in her oral evidence identified by the Judge came about because she was not concentrating on the questions which were being put to her.

33. In her witness statement for the hearing in the First-tier Tribunal, the appellant had the opportunity to provide a clear and considered narrative of the precise chain of events that led up to her submitting a TOEIC certificate in December 2012 as evidence of her meeting the English Language requirement, encompassing the details which she had given in her interview and filling in any gaps that her answers in interview had not covered. But not only did the appellant not purport to give any account at all of the taking of the test in her witness statement, even now she has not sought to give a clear and coherent account of the taking of the test and her subsequent dealings with the test centre.

34. The consequence is that the appellant has not made out a case that the quality of her oral evidence was affected by her being pre-occupied with thoughts of her husband; or that the Judge ought to have adjourned the hearing of his own motion in anticipation of such a problem.

Whether the husband's uncertain prognosis demanded an adjournment

35. It was not at all obvious that an adjournment was required in order to obtain medical evidence as to Mr Hassan's prognosis in the medium or long term. On the medical evidence available to the Judge, there was (as the Judge acknowledged) a wide spectrum of possible outcomes, ranging from a complete recovery to the possibility that he might require the appellant's presence in the UK to look after him. I do not consider that fairness demanded that the Judge should adjourn the appeal hearing of his own motion on the basis that the issues in the appeal could not be fairly determined without it being established what the medium-term or long-term prognosis was. In any event, since it is not the appellant's case on appeal to the Upper Tribunal that the medium-term or long-term prognosis is bleak, it is not shown that the Judge was mistaken in finding that Mr Hassan's medical requirements *"can be met elsewhere"* or that the appellant is not required to remain in the UK in order to look after him.

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.

I make no anonymity direction.

Signed Date 16 April 2019

Deputy Upper Tribunal Judge Monson