



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001873
First-tier Tribunal No: EA/01926/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ISAAC OBENG ADU
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Appearance

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 27 January 2023

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 26 July 1990. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with an EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family Permit) to the Immigration Rules.

2. The appellant applied for an EUSS Family Permit on 18 December 2020 as the family member (spouse) of an EEA national. His application was refused on 9 January 2021, on the grounds that the respondent was not satisfied that his marriage to his EEA national sponsor was genuine, in light of discrepancies arising from the marriage interview. The respondent considered that the marriage was one of convenience.

3. The appellant lodged an appeal against the respondent's decision and the appeal was listed for hearing on 4 October 2021, via the Cloud Video Platform (CVP). The notice of hearing giving notice of the time, date and place of the hearing was served on 21 August 2021 on the appellant at his sponsor's address as well as on his solicitors International IAS Solicitors.

4. The appeal came before First-tier Tribunal Birrell, as listed, on 4 October 2021. There was no appearance on behalf of the appellant by the sponsor or his solicitors. The judge noted that the notice of hearing had been properly served on 21 August 2021, and that in addition to that notice, a notice giving joining instructions for a CVP hearing had been sent to the appellant and his solicitors on 27 September 2021. The judge noted further that, following receipt of that notice, the appellant's solicitors had requested an adjournment of the hearing claiming not to have received the notice of hearing, and that that adjournment application had been refused. Judge Birrell's clerk then contacted the appellant's representatives who indicated that they were aware that the adjournment application of 1 October 2021 had been refused. The court clerk told the appellant's representatives that if they wished to pursue a request for an adjournment they would have to log in, as per instructions that were sent to them, and renew the application before the judge. They did not do so. Judge Birrell then considered the overriding objectives of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and decided to proceed with the appeal in the absence of anyone on behalf of the appellant. Having considered the evidence before her, Judge Birrell concluded that the marriage was a sham marriage and she accordingly dismissed the appeal.

5. The appellant sought permission to appeal to the Upper Tribunal against Judge Birrell's decision. In the grounds of appeal prepared on behalf of the appellant it was asserted that the judge had erred in law by finding that the overriding objectives had been met by refusing a short adjournment.

6. Permission was granted in the First-tier Tribunal on the grounds that the judge had arguably failed to apply the principles of fairness in Nwaigwe (adjournment: fairness) [2014] UKUT 00418.

7. The matter then came before me. Again, there was no appearance by or on behalf of the appellant. Contact was made with the appellant's solicitors who advised the court clerk that they had not heard anything from the Tribunal since January 2022 and were unaware of the hearing.

8. Mr McVeety asked me to proceed with the appeal as the appellant had been properly served with a notice of hearing. He noted that the appellant's solicitors had been told by the First-tier Tribunal on the previous occasion to log on and request a further adjournment in front of the judge but they did not do so. They were fully aware of the hearing date. There was no reason why they could not have dialled into the hearing. The judge was entitled to go ahead and her decision should be upheld.

Discussion

9. It is necessary to consider in more detail the chronology of events in this case, both before the First-tier Tribunal and before the Upper Tribunal.

First-tier Tribunal

10. On 21 August 2021 the First-tier Tribunal served a notice of hearing on the appellant at his sponsor's address and on the appellant's representatives' address, at

the relevant addresses notified to the Tribunal, informing them of the hearing of the appeal on 4 October 2021 at 12pm. According to the appellant's solicitors, in their email correspondence annexed to their grounds of appeal, the notice of hearing was not received by themselves or by the appellant and the first that they knew of the hearing was when they received, on 27 September 2021, a "Cloud Video Platform (CVP) Joining Notice for Parties" from the First-tier Tribunal giving details of how to join the hearing on 4 October 2021. After receiving that notice, on 27 September 2021, the appellant's solicitors emailed the Tribunal advising that they had not previously been aware of the hearing on 4 October 2021 and requesting an adjournment in order to give the sponsor time to prepare her documents and for a skeleton argument and witness statement to be prepared. A further email in similar terms was sent by the appellant's solicitors to the Tribunal on 28 September 2021, which then generated an automatic email response from the Tribunal acknowledging receipt. On 29 September 2021 the Tribunal emailed the appellant's solicitors requesting an appeal bundle for the hearing on 4 October 2021. In an email response of the same day, the appellant's solicitors advised the Tribunal that they could not submit an appellant's bundle as they had not received a hearing notice and had only received the CVP joining instructions, and that they were waiting for a response to their adjournment request. Again that generated an automatic email response from the Tribunal acknowledging receipt.

11. On 1 October 2021 the Tribunal served on the appellant's solicitors directions refusing the adjournment request on the grounds that the notice of hearing had been properly served on both parties on 21 August 2021. The same day, on 1 October 2021, the appellant's solicitor emailed the Tribunal confirming again that they had not received any notice of hearing on 21 August 2021 and again requesting an adjournment for a date after 15 October 2021. A further adjournment request was sent by the appellant's solicitors to the Tribunal on 4 October 2021 at 10.17am enclosing an email from the sponsor (sent on 2 October 2021 from the sponsor to the solicitors) requesting further time to collect evidence.

12. The case then came before Judge Birrell at 12pm on 4 October 2021. The judge was aware of the first adjournment request and was aware that it had been refused on 1 October 2021. It does not appear that she was aware of the second adjournment request made on the morning of the hearing. However her clerk contacted the appellant's representatives to enquire about their failure to appear at the hearing and they confirmed that they were aware that their adjournment request of 1 October 2021 had been refused. The court clerk told the appellant's representatives that if they wished to pursue an adjournment application they would have to log in and renew the application orally before the judge and they were given instructions how to do so but they did not appear before the judge. The judge then proceeded to hear the appeal.

Upper Tribunal

13. Further to the grant of permission to the appellant, a notice of hearing was sent out from the listings team of the Upper Tribunal at Field House, London, on 11 January 2023, by mail to the appellant's solicitors and by mail to both the appellant and the sponsor at the sponsor's address, as well as by email to the appellant's solicitors' email address, for a face-to-face hearing on 27 January 2023.

14. There was no appearance at the hearing. On my instructions, the court clerk contacted the appellant's solicitors by telephone who told her that they had not heard from the Tribunal since January 2022.

15. Dealing firstly with the hearing before me in the Upper Tribunal, I simply cannot accept that the notice of hearing was not properly served on the appellant, sponsor and the appellant's representatives. A notice of hearing addressed to the appellant, and a notice addressed to the appellant's solicitors was sent by email on 11 January 2023 to the email address recorded by the Upper Tribunal as the relevant email address for ILAS Solicitors, namely "info@tykhansolicitors.co.uk". That is the same email address used in the correspondence between the appellant's solicitors and the Tribunal annexed to the grounds of appeal. In addition, a notice of hearing was sent by post to the appellant's solicitors, the appellant and the sponsor, all to the relevant addresses provided in the application seeking permission to appeal and the address to which Judge Birrell's decision, as well as the decision granting permission to appeal to the Upper Tribunal, had been sent. Even if, for some unknown reason, the notice of hearing had not reached the appellant's solicitors either through their postal address or their email address, there is no reason why the appellant, through the sponsor, would also not have received the notice of hearing. I simply cannot accept that there is any reason for the appellant not to have been fully aware of the hearing today and or any reason for his failure to provide a presence at the hearing, either through his sponsor or his legal representatives. Whilst I have exercised every caution in proceeding in the absence of any party on behalf of the appellant, particularly given the nature of the appeal before me and the issues arising in the grounds as a result of the circumstances at the hearing in the First-tier Tribunal, and having considered the guidance in Nwaigwe, I cannot accept that there is any unfairness in proceeding with this appeal in the absence of the sponsor and/or his legal representatives, nor any reason why I should not proceed with the hearing.

16. Indeed, the absence of any appearance before me lends support to the decision of Judge Birrell to proceed with the hearing in the First-tier Tribunal. In any event, I do not accept that there was procedural unfairness arising out of her decision to proceed as she did. As Mr McVeety submitted, it was not being claimed by the appellant that he was unaware of the hearing. His assertion was that he only became aware of it on 27 September 2021. There was therefore advance notice of the hearing and ample time to gather evidence before the hearing, and in any event such evidence could have been prepared in the time following the grant of permission, many months earlier. The sponsor was fully aware of the hearing from 27 September 2021 and there was absolutely no reason for her failing to attend before the judge to give oral evidence about her relationship with the appellant. Further, having been refused an adjournment, it was not for the appellant simply to decide not to provide a presence at the hearing. Whilst he had made a second adjournment request, that was not made within a reasonable time-scale as it was on the morning of the hearing itself. The fact that he had not received a response to that request did not then entitle him to assume an adjournment would be granted, particularly when his solicitors had been specifically told by the Tribunal to log in and make an oral request before the judge but had not done so. In the circumstances, the judge was fully entitled to proceed to hear the appeal as she did and I do not accept that any unfairness arose from her doing so.

17. As for the assertion in the grounds that the judge herself failed to consider the question of fairness before proceeding to hear the appeal, I reject such a suggestion. The judge, at [3], made it clear that she was considering the overriding objective of the Procedure Rules, which was to enable the Tribunal to deal with cases fairly and justly. The fact that she referred to Rule 19 rather than Rule 28 of the Procedure Rules when deciding to proceed in the absence of representation for the appellant is not material since it is clear that she had the interests of justice and the relevant questions of fairness in mind. As for the judge's findings on the merits of the appellant's case, it seems to me that she was fully entitled to consider that the

concerns raised by the respondent on the basis of discrepancies arising from the marriage interview had not been answered by the appellant or sponsor and was entitled to draw the adverse conclusions that she did from the absence of any further evidence which it was reasonable to expect could have been made available in the months following the refusal decision. The judge gave full consideration to the appellant's application on the basis of the evidence before her and in the context of the relevant legal authorities and reached a conclusion which was fully and properly open to her.

18. In the circumstances, I find no errors of law in Judge Birrell's decision and reject the suggestion that procedural unfairness arose in her decision-making. I uphold her decision.

Notice of Decision

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 January 2023