IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002272

First-tier Tribunal No: EA/15538/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 September 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Afra Almoez Mohammed Fageer
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr G Brown of Counsel, instructed by Obeid Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard by remote video at Field House on 13 September 2023

DECISION AND REASONS

1. The appellant, a Sudanese national, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Malik) promulgated 25.4.22 dismissing her appeal against the respondent's decision of 20.10.21 to refuse her EUSS application under Appendix EU (Family Permit) as the family member of a relevant EEA citizen.

2. The sole ground of appeal is that the decision of the First-tier Tribunal is infected by procedural irregularity leading to unfairness and an error of law in that the First-tier Tribunal Judge was not made aware of the adjournment application made by email by the appellant's representatives on the day of the First-tier Tribunal appeal hearing.

3. The First-tier Tribunal appeal hearing took place on 12.4.22 with notice of that hearing issued in good time, on 14.3.22. There was no attendance at the hearing by or on behalf of the appellant. Neither had the appellant submitted any appeal bundle, despite the Tribunal's clear directions to do so. No explanation for the absence of the appellant, her representatives, the sponsor, or the appeal bundle,

was provided. In the absence of attendance or explanation for absence, the judge decided to continue with the hearing. It is this which is complained of in the appeal to the Upper Tribunal, suggesting that there has been procedural unfairness.

4. Permission to appeal was refused by the First-tier Tribunal. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Norton-Taylor granted permission in the decision issued on 24.1.23. Judge Norton-Taylor considered that "Whilst a number of questions arise and the prospects of success are by no means certain, it arguable that a procedural irregularity occurred, resulting in the judge being unaware of an adjournment request on the day of the hearing. The appellant will need to establish that there was indeed a procedural irregularity and, if there was, whether it was material in all the circumstances."

5. When granting permission, Judge Norton-Taylor had directed the appellant to file and serve an indexed and paginated bundle containing the evidence relevant to the challenge set out in the grounds of appeal, no later than 14 days, after the grant of permission was sent out.

6. The matter then came before me as a remote video (Teams) error of law statutory appeal on 23.5.23. However, it transpired that the case was not ready to proceed. Both representatives were missing documents served by the other party; directions issued on 24.1.23 had not been complied with; and crucial information necessary to determine the appeal remains missing.

7. The Upper Tribunal has the respondent's Rule 24 reply, dated 8.2.23, making several points of criticism of the grounds and chronology in maintaining opposition to the appeal. At the date of the hearing before me on 23.5.23, these had not been seen by the appellant's representative, Mr Brown. Neither had Mr Wain, the Senior Home Office Presenting Officer, seen either the chronology referred to by Mr Brown or the email chain relating to the adjournment application.

8. More significantly, the actual timing of the appeal hearing before the First-tier Tribunal needed to be ascertained to determine whether there was any adjournment application before the hearing had in fact concluded and whether it had been drawn to Judge Malik's attention. On checking the CCD portal during the hearing before me on 23.5.23, I found that the case is not listed.

9. In all the circumstances, the hearing before me could not proceed and had to be adjourned with the agreement of both representatives, with directions to be issued.

10. In my Case Management Directions, issued on 27.6.23, I directed as follows:

- The appellant is directed to file and serve on the Upper Tribunal and on the respondent an indexed and paginated bundle containing all the evidence relating to the challenge set out in the grounds of appeal, no later than 14 days after these directions are issued by the Upper Tribunal. For clarity, the appellant's bundle must include all the email correspondence between the appellant's representatives and the First-tier Tribunal, together with any attachments.

- No later than 28 days after these directions are issued, the respondent must re-serve its Rule 24 response, including any amendment deemed

necessary after considering the email correspondence between the appellant's representatives and the First-tier Tribunal.

- The Upper Tribunal will make enquiries with the First-tier Tribunal to ascertain the timing of the start and finish of the First-tier Tribunal appeal hearing on 12.4.22, and whether and if so when the email request for an adjournment was drawn to Judge Malik's attention before the decision was promulgated on 25.4.22. The Upper Tribunal will advise the parties of the outcome of these enquiries.

11. The appellant's representative, Amir Obeid, solicitor with Binas Solicitors, emailed the First-tier Tribunal at 11:53 on 12.4.22 with the email subject heading 'Appeal Number EA/15538/202 – appellant Miss Afra Almoez Fageer,' requesting an adjournment in the following terms:

> "Due to unavoidable family circumstances, I had to take time off work and was unable to comply with Directions of the Court, and upon my return to work this case file has been overlooked, to which I apologise. I kindly and respectfully ask the court to adjourn this case to another date within the next 14 days to allow the legal representatives to comply with the Directions of the Court."

12. Enquiries with the First-tier Tribunal at Manchester by the Upper Tribunal at my request have revealed that the First-tier Tribunal appeal hearing in EA/15538/2021 was listed on the court's ARIA system to start at 11:00 on 12.4.22. However, it appears that in the absence of the appellant and/or legal representative, the start of the hearing was delayed until after lunch, starting at 13:30. The hearing lasted 30 minutes and concluded at 14:00.

13. The appellant's representative's email at 11:53 on 12.4.22 requesting an adjournment was not logged and responded to by the First-tier Tribunal until 17.4.22. The Tribunal's response explained that, "Unfortunately the main reason the email was not passed to the judge was that the subject line gave no idea of the reason for the email. It would have helped us prioritise it if the heading stated that hearing and the adjournment request." It was only in a follow up email the day following the original adjournment request, on 13.4.22 that the subject line had the word 'URGENT' added to it.

14. A second email from the appellant's representatives was sent the following day, 13.4.22, to which the Tribunal responded on 17.4.22 to confirm that the adjournment request had not been passed to the judge in time. On 20.4.22 a further email was sent asking for consideration of the adjournment request and seeking permission to forward evidence in support. In response, on 22.4.22 the Tribunal asked for a copy of the original email of 12.4.22, stating that it would be forwarded to the judge for their consideration. The same day, the representatives emailed again asserting that the non-attendance on 12.4.22 was the fault of the legal representative "*which was caused by very personal family circumstances and I have obtained formal evidence to mitigate the oversight*." It is not entirely clear what is meant by that phrase. It was also suggested that there was evidence "protection by a Higher Court Order," that could only be shared with Judge Malik directly. Again, it is not clear what was material was referred to.

15. The First-tier Tribunal responded to the email of 12.4.22 on 17.4.22, notifying that the appeal had been heard. The Tribunal's email on 20.4.22 also responded to the representative's email of 14.4.22 to the same effect.

16. Later the same day, at 16:43 on 20.4.22, Mr Obeid emailed again, stating: “The legal representative has valid reason supported by documentary evidence, and kindly request if IJ Malik would give permission to forward the same to avoid dismissal of the appeal.” In response, at 10:46 on 22.4.22, the Tribunal requested Mr Obeid to forward a copy of the original emailed adjournment request ‘asap’, stating, “The judge heard the case on the day but I will forward the request to them for their consideration.”

17. Mr Obeid emailed at 12:44 on 22.4.22, attaching a copy of the original adjournment request and stating that the non-attendance at the appeal hearing on 12.4.22 was his fault, and continuing, “which was caused by very personal family circumstances and I have obtained formal evidence to mitigate the oversight. The documentary evidence is protected by a Higher Court Order but I can only share it with IJ Malik directly. I kindly ask if IJ Malik could provide me with an email to forward the evidence, alternatively, I am happy to attend in person to explain my position. I hope this will help avoid refusal of the appeal solely on the basis of our non-attendance.”

18. The next event in the chronology was that the decision of the First-tier Tribunal was promulgated on 25.4.22, a little short of two weeks after the hearing on 12.4.22. It does not appear that the adjournment application or the further email correspondence was ever drawn to the judge’s attention after the hearing and before promulgation took place, which is unfortunate.

19. The appellant’s representatives have now provided the evidence referred to in Mr Obeid’s emails, which comprises a letter from Manchester City Council, dated 20.4.22. Whilst this indicates that Mr Obeid was involved in a personal family matter and that a hearing was listed for 13.4.22, it does not demonstrate that these family proceedings which had been ongoing since 2020 prevented preparation of the appellant’s appeal, or attendance at the hearing on 12.4.22, or the repeated failure to comply with the First-tier Tribunal’s directions for the submission of the appellant’s bundle.

20. I am satisfied that this neither this information nor the request for the adjournment ever reached Judge Malik before the impugned decision dismissing the appeal was promulgated on 25.4.22.

21. The Upper Tribunal has the appellant’s detailed bundle with skeleton argument and helpful chronology, together with the full email history. The respondent did not comply with my direction to draft a revised Rule 24 reply and I have only the original Rule 24 reply; Ms Nolan stated that she was unaware of the directions. However, I have carefully considered all documentation and information now available, including the written submissions together with the grounds, and the oral submissions of both representatives at the hearing before me before reaching any findings or conclusions on this appeal. There is no further information likely to be forthcoming.

22. The original Rule 24 reply makes several valid points of criticism of the grounds and chronology in maintaining opposition to the appeal.

23. With reference to the absence of the appellant’s bundle, a significant point made by the respondent is that at least a portion of the bundle of evidence now relied on, including the appellant’s witness statement, is dated 6.2.23. No adequate explanation has been provided for the failure to serve an appellant’s bundle before the First-tier Tribunal appeal hearing. That documents now relied

on are dated many months after the hearing strongly suggests that there was no appellant's bundle that could have been served in time before the First-tier Tribunal appeal hearing but that the material has been gathered subsequently.

24. Unarguably, the very late request made only after the listed start time for the hearing and unsupported by any evidence, is unsatisfactory. For example, no explanation is provided as to when Mr Obeid realised that the case had been overlooked. Neither does it explain why alternative arrangements were not made for compliance with the directions, or why no appellant's bundle had been prepared and served despite the repeated directions of the First-tier Tribunal to do so. There were surely other solicitors at Binas Solicitors who could have been assigned to the case.

25. Neither does the adjournment request adequately explain why no one, neither sponsor nor representative, attended the hearing to support the adjournment request in person. Furthermore, the email does not indicate that the matter is urgent, or even state when the hearing was listed for. There can be no doubt that the date and time of the hearing had been notified to both the appellant and his legal representatives well in advance, on 14.3.22. Furthermore, it would have been a simple matter to telephone the Tribunal to confirm that the email request had been received and brought to the judge's attention. In all the circumstances, I am satisfied that the email sent on 12.4.22 was entirely insufficient to justify the failure of the legal representative and/or sponsor to even attend the hearing listed on 12.4.22, even if only to make the adjournment request in person.

26. Rule 28 of the Tribunal Procedure Rules 2014 provides that if a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and considers that it is in the interests of justice to proceed with the hearing. Unarguably, the appellant was given ample notice of the hearing and it has not been argued that any party was unaware of the hearing date and time.

27. In considering whether there was any unfairness in the appeal being decided in the absence of sponsor and legal representative, I have considered the Presidential Guidance Note No 1 2014, which includes the following:

> "Each application to adjourn must be considered on its own merits, examining all the factors brought to the Tribunal's attention. When reaching a decision on such an application, the Tribunal may also have regard to information already held and its own special expertise (see rule 2(2)(d)).
>
> Factors weighing in favour of adjourning an appeal, even at a late stage in proceedings, include.
>
> (a) Sudden illness or other compelling reason preventing a party or a witness attending a hearing. Normally such a reason should be supported by medical or other relevant evidence, unless there has been insufficient time to obtain such evidence. However, where there is no likelihood that the party will be able to attend a hearing within a reasonable period, a hearing may proceed in absence where the tribunal considers that this is in the interests of justice in terms of rule 28.
>
> (b) Late changes to the grounds of appeal or the reasons for refusal which change the nature of the case. The terms of rules 19(7), 23(2)(b) and 24(2)

should be taken into account, as appropriate, when considering changes to the grounds or reasons.

(c) Where further time is needed because of a delay in obtaining evidence which is outside the party's control, for example, where an expert witness fails to provide a report within the period expected."

28. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), the President stated that, *"..where a party applies for an adjournment of a hearing, the Tribunal is obliged, in every case, to consider whether the appeal can be "justly determined" in the moving party's absence. If the decision is to refuse the application, this must be based on the Tribunal satisfying itself that the appeal can be justly determined in the absence of the party concerned. 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."* The case also held that fairness applies to both sides.

29. I also bear in mind that a decision which disposes of proceedings is not made until it is served, which was after the adjournment request. In any event, the appellant's representatives could have applied to have the decision set aside to be remade pursuant to Rule 32, on the basis that a party, or a party's representative, was not present at a hearing relating to the proceedings; or that there had been some other procedural irregularity in the proceedings, provided the Tribunal considers that it is in the interests of justice to do so. Nevertheless, such an application has to be made within the time limits set out in the Rule, 14 days for an in-country appellant. No such application was made.

30. On the information now available, I find that the hearing commenced at 13.30, after the adjournment application was sent at 11.53 but never drawn to the judge's attention. As the subject matter of the email did not give any indication of the reason for or urgency of the email and made no reference to the date and time of the hearing, it is unsurprising that, given the need for any such email to be administered by the Tribunal's staff, it was not brought to the judge's attention before the hearing took place. However, although the Tribunal administration promised to put the matter before the judge at a later date this does not appear to have been done, at least not before the decision was promulgated.

31. I also note that on 29.5.23, a few days following the Upper Tribunal appeal hearing before me, the appellant changed legal representatives from Binas Solicitors to Obeid Solicitors, retaining however the services of the same Amir Obeid who authored the adjournment request on 12.4.23. Despite the obligation to do so, the Upper Tribunal was not notified of the change of representation until 6.7.23.

32. The adjournment request made on 11.4.22 was entirely inadequate. Even if it had been received by the judge before the hearing, it is not clear that there was sufficient in the content of the application to render it in the interests of justice to adjourn or postpone the appeal hearing. It is not clear that even if the legal representative and/or sponsor had attended there was any further evidence or submission that could have influenced the outcome of the appeal. However, I accept the force of Mr Brown's submissions that it cannot be said that had the adjournment application been drawn to the judge's attention before the hearing or promulgation that the Tribunal would have proceeded to determine the appeal in the absence of sponsor and legal representative.

33. Whilst the conduct of this matter by the appellant's legal representative was in my view entirely unacceptable, to the point that his compliance with professional obligations and standards must be questioned, I am satisfied that none of that poor conduct was the fault of the out-of-country appellant. I find, as Mr Brown accepts, that absolutely no blame can be attached to the judge's conduct in the First-tier Tribunal. I also bear in mind that the appellant is out of country and was relying primarily on his legal representative to advance the case on his behalf. Mr Brown also asks me to note that the appellant is in Somalia, which has seen recent upheaval, making it all the more difficult for the appellant to manage his own appeal.

34. Considering the matter objectively, I cannot say that the appellant had a fair hearing or that his appeal was dealt with justly consistent with Rule 2 obligation to deal with matters fairly and justly. It follows that I am persuaded that this appeal should be allowed for error of law, and the matter remitted to the First-tier Tribunal to remake the decision.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in its entirely.

The appeal is remitted to the First-tier Tribunal to be remade afresh.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 September 2023