Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/49836/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2016

Decision & Reasons Promulgated
On 11 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

GOKULAKRISHMAN NARAYANASAMY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Malhotra (Counsel) instructed by the appellant (direct access)
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence, I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Thanki promulgated on 30 July 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 8 June 1985 and is a national of Sri Lanka. On 15th February 2013 the appellant applied for leave to remain in the UK as a tier 1 (entrepreneur) migrant. The respondent refused that application on 25 November 2014, in part because the respondent believes it would be undesirable to allow the appellant to remain in the UK as he was convicted of stalking at Woolwich Crown Court in August 2014.

4. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 30 July 2015, First-tier Tribunal Judge Thanki ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and, on 3 December 2015, Judge Hollingworth gave permission to appeal stating *inter alia*

> "The appellant has arguably been deprived of a fair hearing in the light of the material available to the Judge"

The hearing

6. (a) Ms Malhotra, counsel for the appellant, told me that the appellant took ill the night before the hearing of this case and required treatment in accident and emergency. She told me that the appellant is provided with three different types of medication by his GP because the appellant suffers from anxiety and depression. She told me that there were compelling medical reasons why the appellant could not attend his own hearing and that, although solicitors attended on his behalf, those solicitors had failed in their obligation to properly prepare for the hearing so that there was no appellant's bundle.

(b) Ms Malhotra argued that the combination of the appellant's fragile health and the negligence of his solicitors meant that, although the appeal proceeded, the appellant's arguments were not heard. She argued that the appellant had been unfairly deprived of an opportunity to participate in the appeal process. She told me that, given the opportunity, the appellant could produce evidence to demonstrate that the financial documents he relies on are genuine, and can fully address the concerns of the entry clearance officer. She argued that, so far, the appellant had not had the opportunity to do that. She urged me to set the decision aside and to remit this case to the First-tier Tribunal to be decided of new

7. Mr Avery, for the respondent, told me that the Judge's decision does not contain any errors, material or otherwise. He reminded me that the appellant's solicitors withdrew from acting on 27 January 2016 because they have not been placed in funds by the appellant. He told me that there is no evidence that the appellant has made a complaint about a solicitor, nor is there evidence that the appellant had to go to accident and emergency the night before the appeal

hearing. He reminded me that the Judge records that there was no documentary evidence placed before him to show that the appellant would not be fit to attend the hearing. He reminded me that between [14] and [18] the Judge records the request for an adjournment, his consideration of that request and his rejection of the application to adjourn. He told me that there was nothing unfair in the decision to refuse the application to adjourn and that that was a decision that any reasonable Judge would make.

Analysis

8. Rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "*must seek to give effect to*" when exercising any power under the Rules. The overriding objective is to deal with cases fairly and justly. This is defined as including "(*a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues*".

9. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that if a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, the question for the Upper Tribunal is not whether the Firs -tier acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?

10. The history of this case is that the appellant's previous solicitors started acting for the appellant on 28 May 2015. The notice of hearing was sent to the appellant on 10 February 2015. A hearing took place on 15 July 2015. Although the appellant was not present at that hearing, he was represented by a solicitor.

11. Before the hearing, two unsuccessful applications to adjourn were made by the appellant's solicitors. On 18 June 2015 the appellant's solicitors sought an adjournment and said that they would obtain medical evidence to demonstrate that the appellant's psychiatric illness prevented him from attending court. That application was refused. The application was renewed (in writing) on 8 July 2015. That second application was supported by a letter from the appellant's GP. On 10 July 2015 that second application was refused by a duty judge who took the view that, if the prospect of the appeal hearing was

causing the appellant anxiety, an adjourned hearing would not alleviate any stress suffered by the appellant.

12. At [10] the Judge records that no bundle has been lodged for the appellant. If the appellant had come to court on 15 July 2015, there would have been no witness statement from him to adopt as his evidence in chief. I mentioned that to Ms Malhotra, who blamed the appellant's (former) solicitors for want of preparation. Grounds of appeal were prepared by counsel other than Ms Malhotra. Those grounds of appeal do not point the finger of blame at the appellant's former solicitors. (Ms Malhotra was instructed directly by the appellant at the eleventh hour). The appellant's solicitors withdrew from acting the day before the hearing before me on the basis that they were without instructions and had not been placed in funds.

13. No reliable evidence is placed before me to support the submission that the appellant's former solicitors are responsible for the want of preparation. On the contrary, I note that the appellant was happy enough to leave his solicitors with instructions until 27 January 2016, and that, for this hearing in January 2016, the appellant's former solicitors produced a bundle which includes the appellant's witness statement dated 4 January 2016. Because of the lack of evidence of negligence on the part of the appellant solicitors, and because it is a matter which was raised for the first time during the appeal hearing on 28 January 2016, I find that the appellant fails to establish that he was not in a position to lead evidence before the First-tier Tribunal on 15 July 2015 because of the inaction of his previous solicitors.

14. This appeal turns on a narrow point. Was the refusal to adjourn on 15 July 2015 unfair? The appellant was ill and could not attend, but between 10 February and 15 July, both 2015, the appellant did little, if anything, to prosecute his own appeal. His instructions to his solicitors appear to have been limited to attempts to seek adjournments. Because no witness statement had been prepared his participation in the hearing on 15 July 2015 could only have been minimal. The respondent had not been given fair notice of the appellant's detailed position because no bundle for the appellant had been lodged.

15. At [17] the Judge applies the correct test. He says "*I considered whether it was fair to adjourn the appeal hearing*". At [18] the Judge specifically considers the overriding objective set out in the procedure rules before deciding that it was fair and just to proceed in the absence of the appellant, who was still represented by a solicitor.

16. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

17. The respondent's decision dated 25 November 2014 is made on two bases. The first is that the respondent believes that, because the appellant was

convicted at Woolwich Crown Court in August 2014 of a criminal offence, it is undesirable to permit the appellant to remain in the UK. The second is that the respondent produces a document verification report which indicates that financial documents produced by the appellant are forgeries.

18. In his witness statement (dated 4th January 2016) the appellant dwells on the financial documents between [5] and [10]. Even on 4th January 2016 the appellant pays only superficial attention to the impact of his conviction at Woolwich Crown Court. Paragraph 4 of his witness statement deals with that conviction, and (in summary) says that the appellant regrets his actions.

19. At the hearing before me, the appellant produces inadequate evidence to address the respondent's findings in terms of paragraph 322(5) of the immigration rules. The appellant concedes that the respondent's account of his conviction and sentence in August 2014 is accurate.

20. Because of the history of this appeal and because the appellant was legally represented by solicitors until 27 January 2016 I find that the refusal of the adjournment did not deprive the appellant of a fair hearing. I find that at [17] and [18] the Judge manifestly applied the correct test. It was for the First-tier Judge to decide whether or not it was fair to proceed in the appellant's absence. After considering the correct procedure rules and the correct the test, the Judge decided that it was fair to proceed in the appellant's absence. Because the Judge applied the correct test there is no error of law in his decision.

CONCLUSION

21. No errors of law have been established. The Judge's decision stands.

DECISION

22. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 5 February 2016

Deputy Upper Tribunal Judge Doyle