Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10097/2015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reasons Promulgated**
On 13 September 2017	**On 6 November 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NAEEMA MUNIR
(anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER – Islamabad

Respondent

Representation:
For the Appellant: no representation
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Kainth promulgated on 13 January 2017 in which the Judge dismissed the appellant's appeal.

Background

2. The appellant, a national of Pakistan born on 1 January 1979, appealed the decision of an Entry Clearance Officer (ECO) to refuse her entry clearance to join her husband in the United Kingdom.
3. As there is no appeal against a refusal under the Immigration Rules the challenge was on human rights grounds.
4. The Judge sets out details of a preliminary issue at [8] – [13] of the decision under challenge relating to a request for adjournment made by solicitors in Birmingham. The Judge noted the request was previously considered on the day of receipt, 22 December 2016, and refused. The Judge records that the Tribunal clerk telephoned the solicitors at 10:35 on the day of the hearing 23 December 2016, and was told by the representative that he was without instructions and not attending. At [11 – 12] the Judge writes:

> 11. The sponsor has been aware with regards to the hearing date, venue and time. I take into account the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in particular Rule 28. I conclude that it is in the interest of justice to proceed with the appeal. The sponsor had been aware of the hearing date since 12 August 2016. It is very regrettable with respect to his sister's miscarriage, evidence of which was provided. It does not appear that the sponsor's sister was to give evidence. There is no corresponding witness statement from her and no information to suggest a contrary view. In connection with the sponsor's cousin's recent death, no documentary evidence has been provided in support of the same. The appellant's solicitors were spoken to and Mr Hussain advised the clerk of the Tribunal that his office were without instructions.
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> 12. There was no appellants bundle. The parties have been aware concerning the basis for the respondent's refusal decision as early as July 2015 but appear to have been less than proactive in providing the appropriate papers/evidence/material to counter the objections raised by the respondent.

5. The appellant sought permission to appeal alleging he had been deprived of a fair hearing as a result of the refusal to grant the adjournment. The appellant also alleges the Judge failed to consider the matter with an open mind.
6. Permission to appeal was granted by another judge of the First-tier Tribunal on 19 July 2017. The operative part of the grant being in the following terms:

> 2. I note that the judge accepted in his refusal of the application for adjournment that it is regrettable with respect to the sister's miscarriage that evidence of that was provided. The judge went on to state that it did not appear that the Sponsor's sister was to give evidence. The judge stated there was no corresponding witness statement from her and no information to suggest it to the contrary and that with regard to the Sponsor's cousin's written statement there is no documentary evidence about it. I find that there is an error in proceeding with the appeal once it had been accepted that the sponsor's sister had a miscarriage. This was

> a family issue and this would have affected the Sponsor attending when he had to attend to the family issues concerning his sister's miscarriage. It therefore means that he was deprived of an opportunity to give evidence. I find that it was not just for the judge to proceed with hearing the appeal and that there is an error of law in proceeding to hear the appeal.

Error of law

7. The first observation to make is that it is not the function of a judge considering an application for permission to decide whether the judge has made an error of law or not and to make a declaration to that effect. The role of a judge at the permission stage is to decide whether, on the basis of the application made, any alleged error is arguable.
8. The papers show the decision of the ECO is dated 29 July 2015. The date of the Entry Clearance Manager's review in which the decision was upheld occurred sometime after.
9. Following the lodging of the appeal, notice of a pending appeal was sent to the British High Commission in Islamabad, the appellant at a 'care of' address in the United Kingdom, and to the appellant's solicitors, on 8 December 2015. That was followed by a notice of hearing which contained specific directions relating to the filing of all documents that a party was seeking to rely upon in connection with the appeal process by a stated date; of which the Judge notes none were provided.
10. The appellant remained in Pakistan but has a UK based sponsor and UK based solicitors. Those solicitors wrote to the tribunal on the 22 December 2016 in a letter considered by the Judge. The exact text of that letter is in the following terms:

> We write to you in relation to the above matter which is listed for hearing tomorrow. We have just received instruction from client and sponsor to make an application for adjournment. Accordingly we request the Court to adjourn tomorrow's hearing to the earliest available date after 28 days.
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> This request is being made because it is the sponsor's position that the hearing cannot be conducted fairly tomorrow as no documents have been prepared and the sponsor cannot attend Court tomorrow.
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> While the sponsor accepts that the notice of hearing was received by him in August and he had ample time to prepare, however due to some recent events out of his control, he has been unable to do so. His original intentions were to gather as much evidence as he can until start of December so that his claim can be substantiated by way of up-to-date documentary evidence and to provide the Court with a bundle by first week of December. However, since 15 November 2016 his younger sister has been very ill relating to pregnancy and has been in and out of hospital in such a manner that the entire family was consumed in looking after her interest. His sister had a miscarriage and was discharged from hospital on 17 December 2016. Since then the sponsor's cousin has been very ill and unfortunately passed away today. It is the sponsor's position that the entire family was in such turmoil that it was not possible for him to concentrate effort behind his wife's case. His cousin's funeral will be tomorrow and it is very important for him to attend. As such, it

> is requested that the hearing for tomorrow is adjourned so that the sponsor has a fair opportunity to prepare a bundle and attend court to give oral evidence.

11. I have also seen a document headed 'Discharge Letter and Prescription' in relation to a named individual referring to a planned admission on 16 December 2016 and discharge on 17 December 2016. The purpose of the admission was surgical management of miscarriage on 16 December 2016 with overnight observation. The evidence does not support the contention that since 15 November 2016 the relative has been in such a condition that the sponsor was unable to attend to complying with the directions issued by the First-tier Tribunal. It is also noted that the records show the relative was medically fit to be discharged, that no follow-up appointments were required or arranged, and that family/friends were available. Medication required period of 28 days was provided on discharge. It was not made out that there was a need for the sponsor's continual attendance after the relative was discharged.
12. Whilst it is accepted that any event of this nature can be extremely distressing for those involved, the information before the Judge did not establish a satisfactory explanation for the failure to provide documentary evidence which, if the sponsor genuinely intended to provide the same by the beginning of December could have been provided, yet it was not.
13. It is also not clear from the information before the Judge why the solicitors were without instructions. They are clearly on record and the failure to adequately instruct them is further indication of a lack of engagement by the sponsor with the appeal process.
14. The letter also refers to difficulties involving another family member, the cousin, of which there is little evidence regarding how close the sponsor was to his cousin. The letter refers to the cousin passing away on 22 December 2016 and there been a funeral on 23 December 2016 yet the Judge noted that no evidence of this was made available. There was, frankly, no evidence to support the contention that family events that occurred were such that there is a satisfactory explanation for the sponsor's failure to attend the hearing, to instructing solicitors, or to support the finding that the decision of the Judge to proceed amounted to an arguable error of law.
15. The test in every case when an adjournment request is made is that of fairness and had the sponsor provided evidence supporting his assertions that he was genuinely unable to engage with the process and/or to attend, a refusal to adjourn would have been unfair, but no such material was provided.
16. I do not find the appellant has made out that the Judge made a procedural error sufficient to amount to a material error of law in refusing the adjournment request.
17. It is also important to note that the Judge did not dismiss the appeal solely as a result of the failure of the sponsor to attend. The Judge proceeded to determine the appeal on its merits referring to the decision under the Rules and outside the Rules pursuant to article 8

ECHR. Within this process the Judge examined the evidence provided to the ECO/ECM, which included photographic evidence, and found that in relation to article 8, in light of the finding family life existed, the issue was one of proportionality. The Judge noted the comments of the Entry Clearance Manager, which considered a post-dated statement written by the sponsor in support of the review, that no further material evidence had been produced or relied upon by the appellant to deal with specific concerns raised in the refusal. Telephone records were produced but no evidence that they belong to the sponsor and adequate evidence to support a claim the parties were maintaining regular and frequent telephone contact was provided. Evidence of online communications was found to be very basic and not to indicate any depth of feeling or shared experiences. Although a number of money remittances were considered three of the money transfers were found not to be in the name of the appellant with seven in the appellant's name which were not found to be supportive of the claimed relationship and not evidenced by a regular pattern of money transfers.

18. An interview was conducted which the Judge refers to at [25] in which the questions asked were clear and unambiguous and during which the sponsor made statements not supported by the evidence leading to a finding that there was a lack of specific and detailed information in respect of the sponsor's relationship with the appellant.
19. The Judge considered section 117 of the 2002 Act and having weighed up the respective positions concluded that the decision is proportionate.
20. The findings of the Judge were arguably open to him on the basis of the evidence made available. The application seeking permission to appeal does not contain any comment or material that would suggest that the conclusion is unsustainable.
21. No error of law material the decision to dismiss the appeal is made out.
22. If the appellant wishes to enter the United Kingdom it is open to her to make a fresh application during the course of which she will be able to deal with the concerns of the ECO which led to the application being refused on this occasion.

Decision

23. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 3 November 2017