Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04096/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th April 2019	**On 14th May 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MD RABIUL AWAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No Appearance
For the Respondent: Mrs S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Graves promulgated on 18th January 2019. Judge Graves dismissed the appellant's appeal against a decision of the respondent dated 23rd May 2018 to refuse to issue him a residence card on the basis that the appellant had a retained right of residence. There is no appearance today by the appellant or his representative. The Tribunal received an e-mail sent on 25th April 2019 at 2305 hours from City Heights Solicitors indicating that they were not instructed for advocacy at the Upper Tribunal for the error of law hearing. The letter states, "Though we have attempted to contact the appellant in order to seek instruction however were unable

to do so." I am satisfied that the appellant has been informed of the date, the time and the location of his hearing. I am satisfied that there is no good reason for the appellant's absence. In these circumstances I consider it appropriate, having regard to the overriding interest in Rule 2 of the Upper Tribunal Procedure Rules 2008, and having regard to all the circumstances of this appeal holistically considered, that it is appropriate to proceed with the appeal.

2. The appellant is a national of Bangladesh born in 1990. He entered the United Kingdom at some point in 2009. He claims to have met and commenced a relationship with a Polish national whom he married on 17th December 2012. The respondent must have been satisfied both that the Polish national was exercising treaty rights and that there was a genuine marriage because the appellant was granted a residence card based on his relationship with the Polish national on 22nd February 2013.

3. The relationship between the appellant and his spouse deteriorated and they stopped living together in February 2014. Divorce proceedings were initiated and the Decree Absolute was issued on 6th November 2015. This date is relevant because the appellant and his spouse were married for less than three years by the time the marriage came to an end. The appellant was arrested on suspicion of drug related activity in October 2015 and he was remanded in custody until May 2016. He was ultimately released and, although later recalled to custody, I understand that no charges have been brought and that he has no criminal convictions. He was however detained for some five to six months after the divorce. It is clear that he would have been unable to undertake any employment for that period. He claims to have started work in October 2016 and the evidence before the First-tier Tribunal does contain wage slips confirming such employment.

4. The appellant applied on 8th February 2018 for a residence card claiming to have a retained right of residence. This was refused by the respondent on 23rd May 2018. The respondent was not satisfied that the appellant was working or exercising rights under the treaties after the date of divorce. The respondent noted that the marriage had not lasted three years before the divorce was finalised.

5. The Secretary of State's decision attracted a right of appeal. The appeal was listed at Hatton Cross for 15th January 2019. At the hearing there was no attendance by the appellant or his solicitors. The First-tier Tribunal received a letter dated 14th January 2019 from Taj Solicitors stating "we refer to the above hearing and write to inform you that we are not instructed to attend the hearing which is scheduled to take place on 15th January 2019. We apologise for any inconvenience this may cause." The judge noted that the solicitors had come off the record the day before. It is not apparent from the letter that Taj Solicitors had indeed 'come off the record', only that they were not instructed to attend the hearing. The First-tier Judge was satisfied that the appellant had been informed of the hearing and had provided no reason for his non-attendance or no grounds

for an adjournment. The judge, making reference to the Procedure Rules, concluded it was not in the interests of justice to adjourn and proceeded to hear submissions from the Presenting Officer and to determine the appeal. The judge correctly set out the burden and standard of proof and accurately summarised the relevant law. Under the heading "My findings" the judge was satisfied that the appeal had to be dismissed. The judge noted that the married had not lasted three years at the date of the divorce and that the requirements under Regulation 10 of the EEA Regulations were not met. The judge was not satisfied that the sponsor had lived in the UK for at least one year of the marriage. The judge was not satisfied that the appellant had established that he was present in the UK exercising treaty rights between the divorce petition being filed and the Decree Absolute and the judge was not satisfied that the appellant had undertaken any employment or otherwise exercised the equivalent of treaty rights from the point of divorce onwards. In relation to the last finding the judge noted that the appellant himself declared that he was in prison between October 2015 and May 2016 and that he only started work in October 2016. The judge concluded that there was insufficient evidence to establish a right of residence such that a residence card should be issued.

6. The grounds of appeal, presumably settled by the appellant's present representatives, City Heights Solicitors, contend that he was taken unwell before the First-tier Tribunal hearing, that he decided he was not in a fit state to attend the hearing and that he provided medical evidence to Taj Solicitors in advance of the hearing and instructed Taj Solicitors to adjourn the appeal hearing. The grounds contend that Taj Solicitors failed to apply for the adjournment and instead withdrew their instructions the day before the hearing. According to the grounds the appellant was completely unaware of this and was under the impression that the hearing had been adjourned. On instructions from City Heights Solicitors the appellant is said to have attempted to contact Taj Solicitors on several occasions by phone and e-mail but Taj Solicitors failed to respond. I pause to note the complete absence of any evidence either in relation to the appellant being unwell at or around the date of the First-tier hearing, or of any attempts to contact Taj Solicitors. The grounds first invited the First-tier Tribunal to set aside the judge's decision on the basis that the appellant was not present and was unable to make submissions. Alternatively, the grounds sought permission to appeal to the Upper Tribunal on the basis that there was a procedural irregularity. The grounds contend that the appellant had strong grounds for the grant of an adjournment as he was not medically fit to attend the hearing and assert that Taj Solicitors withdrew their instructions without any justified reason and that the absence of any legal representative prevented the appellant from having a fair hearing under Article 6 of the European Convention of Human Rights. I pause once again to note that Article 6 of the European Convention of Human Rights does not apply in administrative decisions, although the principles of administrative fairness and procedural fairness inherent on Article 6 do apply to all aspects of the Tribunal Procedure. Permission was granted by

Judge Hollingworth on 28th February 2019. Judge Hollingworth stated, "It is arguable in the light of the circumstances set out in the permission application, the condition of the appellant and the steps taken which are referred to that unfairness has arisen or is capable of being seen to arise."

7. The appellant's current representatives have provided a bundle of documents for the purposes of the error of law hearing. These replicate the documents that were before the First-tier Tribunal. They include a character reference letter, letters of the appellant's employment from October 2016, evidence of his address, the marriage certificate, the divorce certificate and the appeal documents. They omit to contain any evidence relating to the appellant's state of health at the date of the First-tier hearing and any evidence of any attempt to contact Taj Solicitors. I am not satisfied that there has been any procedural impropriety or procedural unfairness in the First-tier Tribunal's decision. This is because the appellant could have provided medical evidence that he claims was given to Taj Solicitors in support of this appeal. There is no evidence of any sort in the Tribunal bundle. Moreover, the appellant has made serious criticism of his previous representatives. Following **HG (Conduct of Previous Solicitor – Procedure) Turkey [2004] UKIAT 00066**, the current representatives should have communicated the grounds of appeal and any supporting documents to the former representatives and asked them to confirm, deny or comment. There is no evidence before me that there has been any attempt to communicate with Taj Solicitors and there is no evidence to support the very serious allegation that Taj Solicitors failed to act on the appellant's instructions to request an adjournment and came off record instead.

8. In determining whether the failure by the judge to adjourn the First-tier hearing was lawful I have had regard to **Nwaigwe (adjournment: fairness) [2014] UKUT 00418**, a decision of the former President of the Upper Tribunal promulgated in September 2014. Having regard to the principles set out in that decision I am entirely unpersuaded that the appellant was denied a fair hearing, and that the failure by the judge to adjourn or to even consider adjourning the hearing was not, on any view, one that led to unfairness. Even if I am mistaken in terms of the failure to adjourn I am entirely satisfied that the failure to adjourn the hearing could not have made any material difference to the First-tier Judge's conclusion. This is for two very simple reasons. The appellant had not been married for three years and the appellant had not worked for a continuous period after the divorce. It is impossible for the appellant to have met the requirements for the grant of a residence card on the basis that he had a retained right of residence. The grounds wholly fail to engage with these unassailable conclusions of the First-tier Judge. The judge granting permission should have had regard to whether the appeal could, on any rational view, have succeeded. For the reasons given the appeal could not have succeeded and I find that there is no error of law such that the decision ought to be set aside. I therefore dismiss the appeal.

No anonymity direction is made.

Signed
Upper Tribunal Judge Blum

10 May 2019
Date