Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03820/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th August 2022	On 22 September 2022

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MRS SARMIN AKTER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr A Maqsood,* instructed by direct access.
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of her application for an EEA Residence Card under the Immigration (EEA) Regulation 2016 as the extended family member of her cousin, an EEA (Italian) National, Mr Jwell Raj.

2. The appellant, a citizen of Bangladesh, entered the UK on 12th February 2014, as the dependent of her husband, Mr N Basher, who was present in the UK on a student visa and had himself entered the UK on 26th February 2009. The couple had married on 7th November 2013. Mr Raj entered the UK on 18th March 2014 after her, having acquired Italian citizenship, on a

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date which is disputed. The respondent's subsequent refusal letter dated 17th July 2019 refers to an earlier application, first refused by the respondent on 8th September 2016 and an appeal to the First-Tier Tribunal (Judge Henderson). Judge Henderson had dismissed the appellant's early appeal. Judge Henderson did not accept the appellant's dependency on Mr Raj prior to her entry to the UK. I say more about Judge Henderson's decision later in my reasons.

3. The July 2019 refusal (the decision under challenge) also noted the respondent's concern that Mr Raj was not an EEA national during the periods when the appellant claimed pre-entry dependency. In the July 2019 decision, the respondent also rejected any post-entry dependency, noting an enforcement visit in July 2019 in which witnesses suggested that Mr Basher collected rent from other tenants in a multi-occupation property, and, whom it was alleged, was apparently unaware of the relationship between Mr Raj and the appellant.

4. The appellant appealed the July 2019 refusal of her application. Her appeal was heard by FtT Judge Andonian who, in a decision dated 25th November 2019, dismissed the appeal, not only because of the absence of pre- and post-entry dependency, but also on the basis that he did not accept that it had been shown that Mr Raj was exercising treaty rights. The appellant appealed against that decision, principally on the basis that she had been unable to attend the hearing because she had become unwell and had had to attend hospital for treatment at short notice.

5. I previously set aside the Judge Andonian's decision, allowing the appellant's appeal, because the FtT ought to have considered the impracticality of obtaining documentary evidence of being unwell on the same day of the hearing (which was in fact later provided). There were no preserved findings of fact, but bearing in mind the narrow issues, I regarded it as appropriate to retain remaking in the Upper Tribunal.

The issues in this appeal

6. The respondent accepts that the sponsor is now a qualifying person for the purpose of the 2016 Regulations. I identified the remaining issues in dispute:

    6.1. Issue (1) the respondent does not accept that the appellant was an Italian national between the dates of 7th February 2014, when he claims he was naturalised; and 12th February 2014, when the appellant entered the UK from Bangladesh. That period of 5 days is relevant, as this is the claimed 'pre-entry' dependency. The first issue is therefore whether the sponsor was an Italian citizen during that time.

    6.2. Issue (2) – was the appellant dependent on the sponsor, even if only in part, for her essential living needs, and regardless of whether this

was out of choice (see Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 00079 (IAC)), between 7th and 12th February 2014?

6.3. Issue (3) – was the appellant dependent on the sponsor from 12th February 2014 until the date of her application for an EEA Residence card on 8th March 2019? If so, was it continuous and without a 'de minimis' interruption (see §§23 and 47 of Sohrab and Others (continued household membership) Pakistan [2022] UKUT 00157 (IAC)). For the avoidance of doubt, Mr Maqsood specifically confirmed that household membership was not claimed, either pre or post-entry.

6.4. Issue (4) – to what extent where there grounds to depart from Judge Henderson's previous findings in his decision of 11th October 2018, in respect of precisely the same issues? I bore in mind the authority of Devaseelan v SSHD [2002] UKIAT 00702, and in particular, taking Judge Henderson's findings as my starting point (see §39(1)). There were no new facts but instead, I was asked to consider other evidence not before Judge Henderson. I was conscious that these findings were not a 'straight-jacket' (see: R (MW) v SSHD (Fast track appeal: Devaseelan guidelines) [2019] UKUT 00411 (IAC)).

Documents

7. The appellant relied on a main bundle, prepared for a previous adjourned hearing in July 2022, (hereinafter, "AB") and a more supplementary bundle ("ASB"). The latter contained witness statements for the appellant and the sponsor. Mr Maqsood also provided a skeleton argument. I thank both Mr Maqsood and Ms Cunha for their relevant and helpful submissions.

8. I have not recited respective representatives' legal submissions, nor the evidence of the appellant and her sponsor who adopted their brief witness statements and were subject of very limited cross-examination by Ms Cunha. Instead, I only refer to the submissions and evidence where it is necessary to discuss any conflict.

The Hearing

9. Mr Maqsood began by asking me to treat the appellant as a vulnerable witness for the purposes of the Joint Presidential Guidance (No. 2) of 2010. I discussed with him in the context of SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC) in what way there was a link between the appellant's vulnerability and her evidence. Mr Maqsood referred to the appellant's recent Parathyroidectomy surgery relating to her neck, and Hypercalcaemia. The practical effect of this was that there might be moments when the appellant found it difficult to concentrate and would need to pause to understand the question and to reflect on her answer. I discussed with Mr Maqsood, and discussed with the appellant, that if at any stage when she felt she needed a pause in the questions, she should let us know. Mr Maqsood said that having been given the opportunity to

have these short breaks, I was entitled to rely upon the appellant's answers as being unaffected by her conditions.

The Law

10. Regulation 8 of the EEA Regulations states:

> 8 "*Extended family member*"
>
> *(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).*
>
> *(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—*
>
> > *(a) the person is residing in [a country other than the United Kingdom] . . . and is dependent upon the EEA national or is a member of his household;*
> >
> > *(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or*
> >
> > *(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.*
>
> *(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.*
>
> *(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.*
>
> *(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.*
>
> *(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is*

the partner of the extended family member for the purpose of paragraph (5).”

11. The case of Dauhoo confirms that someone can meet the requirements of Regulation 8(2) in one of four ways, each requiring proving a relevant connection both prior to and on arrival: (i) prior dependency and present dependency; (ii) prior membership of a household and present membership of a household; (iii) prior dependency and present membership of a household; (iv) prior membership of a household and present dependency. In the appellant’s case, she claims prior and present dependency.

12. The case of Reyes v Migrationsverket (Case C- 423/12) confirms that an appellant must need a sponsor’s support in order to meet their basic needs for the purposes of financial dependency. It may be out of choice (noting the caveat in Lim v Entry Clearance Officer, Manila [2015] EWCA Civ 1383 about those with savings choosing to rely on financial support not being dependant) and the appellant does not need to be wholly dependent.

13. The burden of proof is on the appellant to prove, to the ordinary standard, that she meets the requirements of the EEA Regulations.

Discussion and findings

14. I considered all of the evidence presented to me, whether I refer to it specifically in these findings or not.

15. I deal with the first issue of whether the sponsor, Mr Raj was an Italian citizen at the date when the appellant entered the UK, namely 7th February 2014. The appellant relies upon a document at page [24] ASB which is a translation by an approved translator of a civil registry birth registration document, which states at box [10]:

> “On 09/10/2013, with the Presidential Degree, Raj Jweel was granted the Italian citizenship with effect from 07/02/2014 (citizenship registration no 6 – year 2014 Municipality of Fabrica di Roma) on 10/02/2014, The registrar Lara Feliziani”.

The registration document was issued on 28th April 2014. Ms Cunha relied upon the date of issue of the sponsor’s passport at page [264] AB which had been issued on 5th March 2014. She argued that the respondent was entitled to require the production of relevant contemporaneous documentary evidence pertaining to the date of claimed dependency, ie. 7th to 12th February 2014. By analogy, she might dispute the exercise of treaty rights where there were not contemporaneous documents evidencing that exercise. However, I accept Mr Maqsood’s submission that it is highly unlikely that a passport would be issued on the same date of naturalisation. I accept, on balance, the sponsor’s evidence that he was naturalised on 7th February 2014, as claimed. Ms Cunha had separately

referred to a document at page [22] ASB which was a registration with the Rome Municipality of the sponsor, which stated that he was registered to the AIRE or Municipal Office "since 07-04-2016" and that on the date of registration to the AIRE, he an Italian citizen. However, I also accept Mr Maqsood's submission that this reflects that he was an Italian citizen before that date and not only an Italian citizen from April 2016. I accept Ms Cunha's concerns that it appears, on the face of it, that the sponsor has re-registered some sort of connection with the Rome authorities and I do not accept the sponsor's evidence that this was to terminate his connection with Rome in 2016. I find on balance it is likely that he seeks to retain some form of connection with Italy, contrary to his assertion that he has no further desire to have any connection with that country, but that does not have a bearing on when he was granted Italian citizenship. I also accept Mr Maqsood's submission that the sponsor's exercise of treaty rights in the UK in the relevant period is not challenged.

16. However, the issue is relevant to Mr Maqsood's submission that I should accept the sponsor and the appellant as being generally credible. This was important when I considered Judge Henderson's findings, to which I now turn. The appellant and her husband both claimed to be the dependants of Mr Raj, which Judge Henderson had rejected. Judge Henderson reflected on the appellant's claim that she had been supported by the sponsor and his parents since childhood and that her immediate family had not approved of her marriage. She had claimed that as a consequence, she was reliant on the sponsor and his family for moral support following her marriage, which she confirmed in oral evidence before me was in or around October 2013.

17. At §14, Judge Henderson recorded the appellant's oral evidence that the sponsor had given her money to fund her studies whilst in Bangladesh, although she also accepted she had been supported at that time by her parents. Judge Henderson described her evidence as "*confused and unclear about who had actually paid for her fees and general expenditure during her studies and also with regard to how much this had cost. The appellant's evidence was also confused with regard to which documents she had supplied to her solicitors on the Home Office*". At §15, Judge Henderson noted that the appellant had said in her oral evidence that the sponsor had sent her money to her father, Mr Miah, and that her father had paid the university for her course. There was no evidence or receipts from the university with regard to her fees.

18. Judge Henderson then went on at §16 to record that the appellant had completed her university studies in Dhaka in 2012 and come to the UK in February 2014. It had been pointed out to her in cross-examination that the money transfers to Mr Miah from the sponsor were all dated after 2014 and so could not have been made for her benefit. She accepted that this was the case and that the sponsor also helped her parents. At §17, Judge Henderson concluded that the appellant's evidence that she had been supported by the sponsor in Bangladesh was not plausible. She was then asked about her claimed dependency in the UK. Judge Henderson

recorded at §18 that the appellant had claimed that the sponsor gave her and her husband £150 cash each month towards their rent which was £300, that she had worked in TK Maxx and her husband worked in the market at Enfield, and they paid the remainder of the rent from their income. They received money as well in cash for groceries but the appellant was confused as to the amount of such payment. She eventually said it was between £25 and £50 each week. She was referred to her bank statements which showed payments from the sponsor of £25 on 26th November and 7th December 2015. She confirmed these were the payments she had referred to. The sponsor in his evidence had not provided any evidence from his bank accounts to show withdrawals of cash to equate to that sum. The sponsor also could not explain why he made £25 payments into the appellant's bank account but £150 regularly in cash to them directly. He also said in his oral evidence he worked as a taxi driver for Uber and earned between £500 to £700 a week. He received housing benefit himself and had to pay less than £100 a week for his own rent. He had a wife and three children and his wife did not work.

19. At §20, Judge Henderson noted that the appellant was taken to her bank statements for November, December 2017 and January 2018 which showed her receiving £550 from her husband with regard to "rent". This was not consistent with the appellant's and sponsor's evidence that the sponsor contributed £150 each month towards the couple's rent. Judge Henderson found their evidence to be inconsistent.

20. Finally, Judge Henderson noted that the sponsor in his oral evidence said that he had last given her money in August 2018, as he had been away on the Hajj pilgrimage after that time but Judge Henderson did not regard that evidence as credible. At §23, Judge Henderson noted the authority of Lim where, in that case the appellant had savings and a retirement fund. It had been held that it was not enough to show that financial support was in fact provided but that the family member must need the support. In this case, at §24, Judge Henderson found that the appellants had not shown that they needed any material support. They were both working and the best evidence showed that the sponsor occasionally deposited £25 paid into their bank account and he had accepted that he not given her any monies after August 2018. The decision under appeal before me was an application for a residence card made in March 2019.

21. Mr Maqsood urges me to depart from Judge Henderson's findings, on the basis that the appellant is now able to explain in far more detail what her incoming monies were and also her outgoing expenditure. She and the sponsor were generally credible.

22. In assessing the appellant's general credibility, I note first the stark discrepancy in the evidence between the appellant and the sponsor in relation to whether the appellant has been and is still on speaking terms with her father, since her marriage in late 2013. This evidence was given in the context of two aspects of her claim. The first was that the appellant had moved and sought to live near the sponsor in the UK because of an

estrangement with her father. She specifically gave evidence that she had not spoken to her father since her marriage in late 2013. The second aspect was of a number of remittance records for payments after 2014 in the appellant's bundle, which were stated as being paid to her father and how these came to be included, when they were for a period after which she claimed to be estranged from him. She stated that these documents had been provided by the sender, her sponsor. However, in his own oral evidence, the sponsor indicated that the appellant was still on good terms with her father. The two positions are clearly irreconcilable and in my view undermine the evidence of the appellant. I conclude that she is not being truthful when she claims to be estranged from her father.

23. Linked to the issue of claimed estrangement is the fact that when the appellant applied to enter the UK, she did so not as the sponsor's dependant, but as the dependant of her husband, whom she accepted in oral evidence before me was, at that time, not only studying but also working, up until 2019, when he was no longer able to work. She accepted that as part of her application, which was not provided to me, she would have needed to prove that she had a certain level of savings, although she could not recall what these were. She also accepted that those savings had been provided by friends and family and specifically not from the sponsor. Mr Maqsood invites me to consider and take judicial notice that by reference to the relevant Immigration Rules at the time, the savings required would, at most, have been in the region of around £2,000 and certainly not sufficient to meet continuing needs that the appellant might have on her travel to the UK. He submitted that when I took into account the costs such as the appellant's air ticket and food, on initial entry to the UK, it was quite feasible that she would require both her savings and also the sponsor's remittances by way of a "top-up", and this was a classic "top-up" case. He relied upon evidence of a remittance transfer via "Ria" (a well-known money transfer company) from the sponsor to the appellant of 6th January 2014 for 41,000 Bangladeshi taka, or £390. She added that she brought £1,000 in cash with from Bangladesh when she entered the UK on 12th February, which was the result of a remittance from the sponsor to her on 9th February 2014. She accepts there is no remittance evidence which corroborates this although there are subsequent remittance slips and I was invited to infer that a mere gap in that evidence did not undermine the central assertion. That particular payment on 9th February is important because it is within the period 7th to 12th February 2014.

24. Just as I am not willing to accept the appellant's general credibility, I am not prepared to accept that merely by virtue of payments before and following the period between 7th and 12th February, that the payment on 9th February 2014 was made. The appellant asserted that she used it, for example, to pay for expenses on arrival in the UK. Even on her case that she is not able to adduce all receipts, there are no receipts for, or detail about what she spent with a considerable sum, namely £1,000.

25. Moreover, as I discussed with Mr Maqsood, there is a material gap in the evidence as to her husband's financial means. No bank statements are

provided for him at all. He was working before her application for entry clearance, until 2019. On the appellant's oral evidence, he earned in the region of around £400 to £500 a week. At the time, to re-reiterate, she entered as his dependant, not the sponsor's, with savings provided by friends and family (but not the sponsor) to meet the entry requirements; and in circumstances where I have found that she is not estranged from her father.

26. While there is a remittance of January 2014, this was before the sponsor was an Italian citizen. There is no evidence of a 9th February 2014 remittance, other than the appellant's and sponsor's oral evidence. There is no evidence in the form of receipts of what the £1,000 was spent on, nor any detail about that expenditure. I am also not satisfied of the appellant's general credibility, or that the lack of detail is explained by her vulnerability as a witness. I am not prepared to accept the oral evidence as reliable on the point. There is a material gap in the evidence, and no explanation for the lack of bank statements for the appellant's husband, on whom she claimed to be a dependant. I also do not accept that she did not apply to enter as the sponsor's dependant, because she was unaware that she could do so, as she claims. I find that she did not do so because the sponsor was not an Italian citizen until early February 2014 and she was her husband's dependant. I accept that the appellant puts her case as a "top-up" scenario, because the couple's means were otherwise not sufficient. That does not explain why no evidence is adduced for the other half of that couple, the appellant's husband.

27. I turn to the question of the ongoing support from 12th February 2014. Mr Maqsood invites me to consider remittances received by the appellant from the sponsor in 2015, 2016, 2017 and 2018. Turning first to 2015, he invited me to consider at page [44] ASB a bill payment dated 26th November of £25, and on 7th December, a bill payment of £25.

28. The appellant's bank statement dated December 2015, showed that on 26th November she had received corresponding amounts at pages [54] to page [55] ASB. There were further payments on 14th December of £20 and £700 on 21st December. In respect of 2016, he referred me to pages [64], [65], [66] and [68] ASB. At page [64] ASB, there were two payments in March 2016 of £10 each and at page [65], on 29th February 2016, a further transfer of £15. In March 2016, there were deposits of £15 on 7th March, and two deposits of £15 on 15th March (page [66]). nies from Mr Raj in March of £15 on 7th March, £15 on 14th March and a further £15 that day. In 2017, I was referred to pages [71], [72], [75] and [79] ASB. In respect of page [71], in August 2017 there was a receipt from the sponsor of £67.80 and a further £27.26. At page [72] ASB there was a reference to a payment of £165 and at page [75], a further payment of £202.11. Finally at page [79] ASB there was a reference to a payment in November of £48. In 2018, I was referred to pages [90], [94] and [95]. In January 2018 this included a payment from the sponsor of £91.80 and £130 on 4th April, two payments of £20 on 20th and 23rd April.

29. As can be appreciated from the evidence to which I have been referred, the documentary evidence of bank transfers is at best sporadic, in typically small amounts (albeit with some larger amounts) and in where the appellant accepted in oral evidence that for many months she would receive no payments from the sponsor at all. Even if I accept, as to which I have significant doubts, that there were regular direct cash payments as the appellant contends, these were sporadic and in circumstances where I do not have sufficient evidence of the wider financial circumstances of the appellant and her husband. The evidence is simply deficient in showing that the appellant is reliant on the sponsor, even for "top-up" payments. I am not satisfied that I have been provided with the full picture of the couple's finances. Even if I accept the sponsor's evidence that there were times at which, because of the closeness of the families, the appellant would regularly ask him for money, these were sporadic and where there were more than de minimis interruptions between the periods of claimed dependency. In the circumstances, I have no hesitation in concluding that the evidence was simply deficient, notwithstanding any difficulties that the appellant might have faced in Bangladesh in evidencing bank transfers.

30. Accordingly, I find that the appellant has not shown that during the period 7th to 12th February 2014 or in the period from 12th February 2014 until March 2019 she was dependent, even if only in part, on the sponsor. I find it far more likely that she was in fact dependent on her husband and indeed it was on that very basis that she had applied for entry to the UK.

Conclusions

31. On the facts established in this appeal, the appellant has not established that she is or was dependant on the sponsor. The appellant is therefore not the sponsor's extended family member for the purposes of the Immigration (EEA) Regulations 2016.

Decision

32. The appellant's appeal under the Immigration (EEA) Regulations 2016 fails and is dismissed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **12th September 2022**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03820/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC and via Skype for Business On 29th January 2021	**Decision & Reasons Promulgated On 8th February 2021**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

MRS SARMIN AKTER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: *Mr A Maqsood*, instructed by Saint Martin Solicitors
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 29th January 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also available to watch, live, at Manchester CJC. The parties

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did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Andonian (the 'FtT'), promulgated on 25th November 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 17th July 2019 to issue her with an EEA Residence Card, to confirm her status as an extended family member (namely a cousin) of an Italian (EEA) national, whom she claimed was exercising treaty rights in the UK. The appeal was under the Immigration (EEA) Regulations 2016.

4. In essence, the appellant's claims involved the following issues: (1) whether the claimed sponsor was in fact exercising treaty rights; and (2) whether the appellant was previously and currently dependent on the sponsor, in the context of a prior adverse finding by a First-tier Tribunal (Judge Henderson), which rejected both prior and current dependency.

The FtT's decision

5. At the start of the FtT hearing, the appellant's representative applied for an adjournment on the basis that the appellant was medically unwell and had been admitted to hospital that morning. The FtT refused the adjournment application. He did so on the basis that there was no letter from the hospital, even if sent by fax or email via the appellant's solicitors, which he regarded could have been produced. The FtT also noted that the sponsor was not in attendance at the hearing and there was no reason why he had not attended. The FtT decided to continue with the hearing in the appellant's absence, at which stage the appellant's representative withdrew from the hearing. On the evidence before him, and in a detailed analysis of the documentary evidence, the FtT took as his starting point the prior First-tier Tribunal determination (Judge Henderson) and concluded that once again, the appeal failed on the grounds of the lack of evidence of prior and current dependency, as well as the sponsor's lack of exercise of treaty rights.

6. Having considered the evidence as a whole, the FtT dismissed the appellant's appeal.

7. It is the adjournment issue which is at the heart of this appeal.

The grounds of appeal and grant of permission

8. The appellant lodged grounds of appeal which challenge the FtT's refusal to adjourn the hearing. The grounds assert that the appellant's husband emailed the appellant's solicitors on the day of the hearing, and there is a suggestion, albeit not entirely clear, that the appellant's representative notified the FtT, but the FtT insisted on a letter from the hospital, or refusal by the hospital to provide a fax or email to that effect.

9. Noting the well-known authority of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), the appellant had been deprived of a fair

hearing, and it would not have been possible to deal with the appeal by way of submissions only.

10. Permission to appeal to this Tribunal was granted by Judge of the First-tier Tribunal, Judge Robertson, on 2nd July 2020. She regarded it as arguable that the FtT had erred in not taking into account that it might have been difficult to obtain evidence about the appellant's illness to forward to the Tribunal on the day of the hearing, when the appellant only became unwell that morning.

The Law

11. Nwaigwe gives the following guidance at §§5 to 7:

> *"5. In the Rules matrix outlined above, rule 21(2) is a provision of critical importance. Its effect is 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. As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right of every litigant to a fair hearing, is engaged. In any case where a question of possible adjournment arises, this is the dominant consideration. It is also important to recognise that the relevant provisions of the 2005 Rules, rehearsed above, do not modify or dilute, and are the handmaidens, their master, and the common law right in play.*
>
> *6. Viewed through this prism, rule 21(2) is to be considered as reflecting the common law right engaged. In every case, the Tribunal must have careful regard to rule 21(2). This provision of the Rules expresses the common law right of every party to a fair hearing. In considering rule 21(1)(b) in tandem with rule 21(2), together with the right to a fair hearing of the party or parties concerned, a balancing exercise must be conducted. In performing this task, tribunals should be alert to the doctrine of abuse of process. In cases where the Tribunal considers that an adjournment*

application is based on spurious or frivolous grounds or is vexatious, the requirement of demonstrating good reason will not be satisfied. However, this will not be determinative of the question of whether refusing an adjournment request would compromise the right to a fair hearing of the party concerned. In some cases, adjournment applications based on particularly trivial or unmeritorious grounds may give rise to an assessment that the process of the Tribunal is being misused and will result in a refusal. Tribunals should be very slow to conclude that the party concerned has waived its right to a fair hearing or any discrete aspect thereof. Where any suggestion of this kind arises, it will be preferable to evaluate the conduct of the party concerned through the lens of abuse of process and it will always be necessary to give effect to both parties' right to a fair hearing.

7. 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, it is important to recognise that the question for the Upper Tribunal is not whether the FtT 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? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion."

The hearing before me

The appellant's submissions

12. Mr Maqsood asked me to consider §§2 and 3 of the FtT's decision, in particular, §2, which stated,

> *"At the commencement of the hearing the appellant's representative asked for an adjournment….the appellant and her husband had been taken to A&E earlier in the morning and had not yet been seen [Mr Maqsood's emphasis]. There was no letter from the A&E Department to state that they were at the hospital and as a result could not attend the hearing. There was nothing before this Tribunal to the effect that the appellant would not be in attendance to give evidence. In addition, the EEA family member on whom they relied, namely the said Italian national Mr*

> *Jwell Raj was not in attendance at the Tribunal nor had he furnished a latter to the effect that his cousin and her husband could not attend for the reasons given by the said representative. Neither had the said sponsor given a note or letter to the appellant's representative to show me to the effect that her cousin and husband were not in hospital and could not attend."*

13. In the circumstances, Mr Maqsood urged me to consider two things. First, as clearly recorded in the FtT's decision, the appellant and her husband had yet to be seen by the hospital A&E staff. As could be seen from the subsequent email correspondence provided with the grounds, Saint Martin Solicitors had emailed Mr Eruma, (the appellant's representative before the FtT) on the morning of the hearing, 8th November 2019 at 10.10am, confirming as follows:

> *"Dear Mr Eruma*
>
> *We have received an email from the appellant's husband earlier this morning and he informed us that the appellant has been admitted at the Royal London Hospital with chest pains and breathing problems. This is the update we have from the appellant's husband. Please find an email for your attention."*

14. The enclosed email timed at 9.08am referred to the appellant having become sick, unconscious and having chest pains and breathing problems and that the appellant, her husband and the sponsor were currently at the Royal London Hospital where they were waiting to be seen by doctors and they could not make their way to the hearing today.

15. As I discussed with the representatives, in addition to these emails were various medical records which I do not repeat in full. Suffice to say that there was an emergency department discharge summary, the first page of which confirmed that the appellant had attended the Royal London Hospital on the morning of the hearing at 9.08am.

16. Mr Maqsood submitted that the FtT had failed to consider that obtaining documentary evidence on the morning of the hearing was impractical, when the appellant had yet to be seen by doctors.

17. Second, the FtT had erred in failing to consider whether it was appropriate to put the appellant's appeal to the back of the hearing list, to be heard later in the afternoon.

18. Third, the FtT had considered immaterial matters, namely the lack of a letter or explanation for non-attendance by the sponsor, when he was worried about the appellant's health, as testified to by a witness statement from the appellant adduced for this appeal in the Upper Tribunal, at §12.

19. I explored with Mr Maqsood whether the FtT could have resolved the appeal on the basis of the sponsor's evidence alone, as this could have a

bearing both on his exercise of treaty rights and the appellant's claimed dependency on him. I also explored whether, if there were any error, it was material, in light of the arguably limited documentary evidence and limited reference in the witness statements before the FtT about the sponsor's exercise of treaty rights – if there were no such exercise, the appellant's appeal was bound to fail.

20. In response, Mr Maqsood submitted that the appeal could not have been fairly resolved by the sponsor's witness evidence alone, as there had been adverse findings by the previous FtT (Judge Henderson), which the appellant needed to address. To the extent that there were gaps in any documentary and written witness evidence, oral evidence was key. Moreover, additional documentary evidence could be produced for any remaking. It could not be said that had the sponsor attended the FtT hearing, the FtT would have been bound to have dismissed the appellant's appeal.

The respondent's submissions

21. Mr Bates submitted that the primary issue had clearly been identified in the respondent's refusal letter, which the FtT had correctly and adequately engaged with, namely whether the sponsor had been exercising treaty rights. The only documentary evidence relating to this before the FtT was at page [166] of the First-tier Tribunal bundle, which was an HMRC self-declaration dated 28th November 2018, in which the sponsor had declared a minimal amount of income. His witness statement had simply referred to exercising treaty rights, without further detail. Given the limited evidence, the FtT was bound to have rejected such evidence where there was an absence of explanation by the sponsor as to why other documentary evidence had not been adduced.

Discussion and conclusions

22. I have considered in particular the guidance set out in Nwaigwe, to which I have already referred**,** which makes clear that the test is not whether the FtT acted reasonably in refusing the adjournment, but instead, the FtT should consider the reason for the adjournment request, but more importantly, should focus on whether, in refusing the adjournment application, the appellant would be deprived of a fair hearing.

23. On the one hand, it was not necessary for the FtT to have referred expressly to Nwaigwe, (although an express reminder by the FtT of such guidance may have assisted). I am also very conscious of the difficulties which Judges face when dealing with last minute adjournment applications, and that such a decision is finely balanced. On the other hand, the appellant cannot be criticised for the last-minute nature of the application, in light of the uncontested evidence before me that the appellant had only just been admitted to hospital at 9.08am on the morning of the FtT hearing. Focussing on the key issue of whether the FtT had adequately considered whether the appellant might be deprived of a

fair hearing, I conclude that the FtT erred in law. Specifically, the FtT was aware, as he recorded at §2 of his decision, that the appellant was claiming to be at hospital, but still awaiting examination by doctors. The FtT's expectation that the appellant could nevertheless be expected to produce documentation from the hospital, before she had even been examined, was both unrealistic and impermissibly imposed a documentary burden, when the issue had arisen at such short-notice. I further accept Mr Maqsood's submission that even if not expressly raised as a possibility by the appellant's representative, the FtT could have considered putting the hearing back to the end of the day, to ascertain whether any documentary evidence could have been produced; or to have adjourned and issued directions for the production of such medical evidence within a few days afterwards, so as to mitigate the risk of an unmeritorious and unwarranted adjournment application. Indeed, had the FtT in this case followed that final course, namely to adjourn and direct that relevant documentary evidence be provided, he would have been provided the same evidence which is now before me. In summary, the FtT failed to adequately address the risk of the appellant being deprived of a fair hearing, and the refusal to adjourn was an error of law.

24. In considering whether it was appropriate to set aside the FtT's decision, I also considered that whether the lack of attendance by the sponsor would have made any difference, in other words, even had he attended, whether the FtT was bound to dismiss the appellant's appeal because of the absence of evidence on the exercise of treaty rights.

25. I conclude that even if the documentary evidence as to the exercise of treaty rights before the FtT was arguably limited, the sponsor's oral witness evidence could, (and I put it no higher than this), have addressed his claimed exercise of treaty rights and that his oral evidence could have been tested in cross-examination, even if his written witness statement did not provide any detail on the issue, beyond a bare assertion of the exercise of treaty rights. In circumstances where it was at least a possibility that the FtT's decision could have been different, I am satisfied that the FtT's error was material (noting that the sponsor had also attended the hospital with the appellant, as to which I make no criticism) and accordingly the FtT's decision is not safe and should be set aside, without preserved findings of fact.

Decision on error of law

26. In my view there are material errors here and I must set the FtT's decision aside, without preserved findings of fact.

Disposal

27. With reference to paragraph 7.2 of the Senior President's Practice Statement, despite there being no preserved findings, noting the narrowness of the issues between the parties, the limited fact-finding and potential resolution of the appeal in the Upper Tribunal without delay, I

regard it as in accordance with the Overriding Objective that the Upper Tribunal remakes the FtT's decision which has been set aside.

Directions

28. The following directions shall apply to the future conduct of this appeal:

(a) The Resumed Hearing will be listed before Upper Tribunal Judge Keith, held at Manchester CJC, and with attendance via Skype for Business, time estimate **2** hours, no interpreter needed, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

(b) The appellant should make any rule 15(2A) application he wishes to make, without delay, and no later than prior to production of a joint bundle. Such an application will be considered (and has not yet been granted) once made.

(c) The appellant shall no later than 4 PM, **14 days prior to the Resumed Hearing** date, file with the Upper Tribunal and serve upon the respondent's representative a consolidated, indexed, and paginated **electronic bundle** containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only. The representatives should not attend the Resumed Hearing assuming that extensive oral examination-in-chief will be permitted. The bundle should be compiled and served in accordance with paragraphs [23] to [26] of the UTIAC Presidential Guidance Note No. 1 of 2020.

(d) The parties shall file with the Upper Tribunal and serve on one another any skeleton arguments no later than 4 PM, **7 days prior to the Resumed Hearing.**

(e) The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

(f) Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [*email*] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

(g) Service on the Respondent may be to [*email*] and to the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, with no preserved findings of fact. The Upper Tribunal will remake the decision.

No anonymity direction is made.

Signed J Keith Date: 5th February 2021

Upper Tribunal Judge Keith