



IAC-FH-AR-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/05904/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 6 August 2015  
Oral Decision**

**Decision & Reasons Promulgated  
On 21 August 2015**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL  
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**AGRON XHAFA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Lee, Counsel, instructed by Salmon & Co Solicitors

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Rozanski promulgated on 24 February 2015. In that determination Judge Rozanski dismissed the appellant's appeal against the decision of the respondent to refuse his claim for asylum and to remove him from the United Kingdom.

2. The appellant did not attend the hearing. The hearing had previously been adjourned from 17 September 2014 until 3 February 2015. As the judge records in her determination at paragraph [2], the appellant was aware of that and noted that he had submitted a witness statement stating that he would be at the hearing on Tuesday 3 February 2015. He did not (and this is accepted), appear at the hearing but on 4 February, the day after the hearing, the appellant wrote a letter to the First-tier Tribunal stating that he had telephoned Taylor House that day and had been told that the hearing had taken place as scheduled. He explained also that he received a letter from the UK Border Agency (a copy was enclosed and we will turn to it in due course), and it is noted by the judge at [3] of her determination that the appellant had not in fact requested another opportunity to attend the hearing.
3. The judge took these matters into account and concluded that in all the circumstances of the case it would be appropriate and in the interests of justice to proceed with the hearing in this case, noting in particular the significant lack of credibility on the part of the appellant.
4. The appellant sought permission to appeal against that decision for the grounds which are set out in the bundle. In essence the challenge is that the appellant was unrepresented at the time and that he had been confused as to whether the hearing was to take place because of the letter which he had received from the UK Border Agency refers to him being informed in due course by the IAC as to a date of hearing. It is the appellant's case that he took that to mean that a fresh date was to be given, the letter having been sent out on 26 January 2015 and thus after the date of 3 February had been fixed.
5. A further ground is that there was unfairness as there had been an incorrect procedure as there had been no Case Management Review but was not pursued with any vigour before us by Mr Lee. It is also said that in the circumstances as there had been an unfair hearing then the decision was in its findings of fact unsafe.
6. On 22 March 2015 First-tier Tribunal Judge Brunnen granted permission and it is on that basis the matter appeared before us.
7. Mr Lee submitted that there had in this case been unfairness of the type identified by Mr Justice McCloskey, President of the Upper Tribunal, in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), submitting that there were two possibilities here: first, that the appellant was telling the truth and had in fact been confused, and thus the judge should then either have adjourned the hearing or, given that she only became aware of this after the event, have relisted the matter for hearing. He submits that there were two stages to be gone through in assessing whether there was unfairness. Firstly, whether the letter from the Home Office was capable of confusing the appellant and, second, whether the judge had properly assessed and given proper attention to the explanations given by the appellant for his non-attendance. It is noted in submissions and in the

witness statement that has now been produced by the appellant that the appellant had, it is said, tried to contact the Home Office or that there is no sufficient indication that he had attempted to contact the Tribunal prior to 4 February.

8. Mr Jarvis has submitted that on the facts of this case there had in fact been no unfairness and that the judge had properly set out the reasons why she had decided to proceed with the appeal and to make a determination although informed of the appellant's reason for non-attendance. He submitted further that there was no material error in this case given the judge's assessment at paragraphs 24 to 26 of the case taken at its highest.
9. In response Mr Lee submitted that materiality was not except in extremely unusual circumstances a factor to be taken into account in assessing whether a matter should be set aside or not following procedural irregularity.
10. In assessing this case we bear in mind two matters. First, that the requirements of fairness vary from case to case and what is required is specific to a situation. We note also that this is an international protection case and that accordingly a commensurately high standard of procedural fairness or, as it is often put, anxious scrutiny, is required.
11. We note that in this case the appellant was clearly informed of the date of hearing. He knew of it and set it out in his witness statement which was received by the First-tier Tribunal on 11 November 2015. We note also that the letter of 4 February 2015 that he sent in to the Tribunal makes no request for an adjournment and makes no request for a fresh hearing, stating only that he had made a phone call to Taylor House and had been told on 4 February that the appeal had been heard the previous day but records that he had received a letter from the Home Office on 26 January.
12. A copy of the relevant letter of 26 January 2015 is attached to the letter of 4 February. It is a standard letter of the type normally sent to appellants when the Secretary of State has forwarded papers to the First-tier Tribunal. It records that the documents have been forwarded and sent to the Tribunal and states "The IAC will contact you directly regarding the date, time and place of any oral hearing. Please note the following" and gives instructions about changes of date or similarly if he no longer wishes to proceed with the appeal.
13. We consider that in the circumstances of this case the judge was entitled to conclude that the appellant had been aware of the hearing and had chosen not to attend. There is a degree of inconsistency in the explanations given by the appellant; there is no sufficient indication that the appellant had tried to contact the Tribunal to resolve any issues of doubt he may have had, and if he was in doubt it begs the question as to why he then decided to contact the IAC the day after the hearing when

there was inevitably a risk that the hearing would have taken place in his absence.

14. We do consider also that as the judge records in her decision, there was no request for the matter to be adjourned or relisted. Whilst we accept that the appellant was unrepresented and the judge was aware of that, and whilst the appellant has been, we accept, deprived of an oral hearing, we do not consider that that is any fault of the Tribunal, nor, for that matter, of the Home Office. Whilst the letter may at worst have been unhelpful it clearly came from a source other than the Tribunal with whom the appellant had already been in contact and it is clear from reading the file that he had been at the previous hearing which had been adjourned. The judge was clearly aware of the letter from the Home Office as is shown in her determination at [2] to [4] and took it into account.
15. We consider that in all the facts of this case that fairness did not require the judge to have relisted the case, given not least that there was no request made by the appellant to do so, and there was no sufficient explanation for the failure to attend on the date listed.
16. The judge in her decision at paragraphs [2] - [4] sets out in adequate detail why she decided to proceed in the appellant's absence and we consider that notwithstanding the fact that this is a protection claim that she was entitled to do so, and we are not satisfied by the reasons given by the appellant for his non-attendance.
17. In those circumstances and bearing in mind the degree of heightened scrutiny applicable we are nonetheless not satisfied that there was in this case any unfairness in the judge proceeding in the appellant's absence, given his decision not to attend, and that accordingly the determination of the First-tier Tribunal did not involve the making of an error of law.
18. For the sake of completeness we have considered also the determination of the judge and we consider that the findings that she reached as to findings of fact were clearly ones open to her and that she was manifestly entitled to make the adverse findings of credibility reached on the basis of the material before her, not least the fact that the appellant accepts that he had previously made an application for asylum in a different identity and claiming to be of different nationality from that which he now says he is.

## **SUMMARY OF CONCLUSIONS**

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed

Date: 18 August 2015

Upper Tribunal Judge Rintoul

