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

Appeal Number: HU/02361/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 22 November 2017**

**Decision & Reasons Promulgated
On 27 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

**J V P
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Singh, counsel

For the Respondent: Ms Z Ahmad, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge N M Paul (“the FTTJ”) promulgated on 18 January 2017, in which he dismissed the Appellant’s appeal against the refusal of leave to remain in the UK as dependent partner of a points based system migrant.
2. No anonymity direction was made by the FTTJ but given the allegation, yet to be decided, as to the appellant’s honesty he is entitled to anonymity in these proceedings.

Background

3. Prior to submitting the application which gave rise to the respondent's decision and the appeal in the First-tier Tribunal, the appellant had previously applied for leave on 13 April 2012; he submitted a TOEIC certificate issued by the Educational Testing Service in support of that application. The respondent identified that his test had been undertaken by a proxy and refused the current application under paragraph 322 of the Immigration Rules on the grounds that the appellant had submitted false documents in support of the earlier application.
4. The appellant issued a notice of appeal requesting an oral hearing in the First-tier Tribunal. By the time of the hearing before the FTTJ the appellant had notified the Tribunal that he wanted the hearing to be on the papers. The FTTJ's decision records that the appeal was "heard on the papers" on 11 January 2017 but the decision is dated 16 January 2017 and it was promulgated on 18 January 2017.
5. The appellant sought permission to appeal on the grounds that the respondent had failed to comply with the direction that she serve her evidence by 8 November 2016; nor had the respondent complied with Rule 24 of the *Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*. It was averred the FTTJ had not complied with R25 in making his decision on the papers without an oral hearing. It was also contended in the grounds of appeal that the FTTJ had failed to follow the approach in **SM & Qadir v SSHD (ETS – Evidence – Burden of Proof) [2016] UKUT 00229 (IAC)**.
6. Permission to appeal was granted on the basis that it was "arguable, given the evidence on the IAC case file, that the judge failed to appreciate that the appellant cancelled his oral hearing, not in order to avoid cross-examination, but because the Tribunal had advised him that the respondent had submitted no evidence. Evidence was submitted by the respondent very late in the day and it is arguable that the judge may have fallen into procedural error in disposing of the appeal in the manner he did."
7. Hence the matter came before me.

Preliminary Issue

8. Both representatives indicated that a potential preliminary issue had been identified. Before me Ms Ahmad submitted that there was no jurisdiction for the appeal. She referred to the Immigration Act 2014. She noted the application had been made by the appellant in January 2015 and the decision of the respondent was taken in July 2015. She said that appeal rights had been withdrawn for points based applicants on 20 October 2014; thus the appellant did not have a right of appeal. Nor could jurisdiction be waived by mistake (**Virk v SSHD [2013] EWCA Civ 652**).
9. Mr Singh, for the appellant, noted that the appellant had applied for leave to remain as the dependent of a points based migrant. As this was an issue which had been raised at short notice, he had been unable to research the relevant legislation. He made no positive submissions as a result. He noted the respondent's refusal letter had invited the appellant to pursue an appeal against the refusal; he submitted that, if this was not correct, the appellant's position had been prejudiced by the respondent's misrepresentation of his rights.

10. The Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) was amended by the Immigration Act 2014. In so doing it restricted the appeal rights available. While it is correct to state that some appeal rights were lost from 10 October 2014, these were those relating to Tier 4 applications. All other points based scheme applicants lost their appeal rights from 2 March 2015. On 6 April 2015 remaining applicants under the Immigration Rules lost their appeal rights. Dependents of points based scheme migrants fall into the latter category. They are covered by the transitional provisions in the Immigration Act 2014 (Commencement No 4, Transitional and Saving Provisions and Amendment) Order 2015 (“the 2015 Order”). In the case of the appellant he made his application on 15 January 2015 and the respondent’s decision was made on 1 July 2015; he thus benefited from the transitional provisions.
11. This was in fact decided by the Duty Judge on 27 January 2016, the issue having been raised by the respondent by email to the Tribunal when the notice of appeal was served on her.
12. For these reasons, I find that the appellant had a right of appeal against the decision of the respondent.

Submissions on error of law

13. Mr Singh adopted the grounds of appeal to this tribunal which I have summarised above. He said that if the respondent’s documents had been served on 5 January, this was only a matter of days before the date on which the FTTJ had decided the appeal on the papers. I referred Mr Singh to the notice of directions dated 15 December 2016 on the tribunal file; he took instructions and advised me that neither the appellant nor his solicitors had received those directions. In essence, the appellant had relied on the respondent’s failure to serve a bundle in accordance with the Procedure Rules and the directions issued after the notice of appeal had been lodged. He had, as a result, decided there was no need for him to attend the hearing: the respondent had not adduced evidence such that the burden of proof would pass to the appellant, pursuant to **SM & Qadir**. It was submitted there was procedural unfairness in the failure of the FTTJ to adjourn the hearing to enable the appellant to address the respondent’s evidence which had been served late.
14. For the respondent, Ms Ahmad submitted that the issue was whether the FTTJ had acted fairly; whether, had further evidence been adduced, a different decision would have been reached. In any event, the appellant had not sought an oral hearing after receiving the respondent’s documents on 5 January 2017.

Discussion

15. The appellant’s solicitors wrote to the Tribunal on 23 November 2016 asking whether the respondent had provided her bundle and noting that the oral hearing was scheduled for 9 January 2017. Mr Singh produced an email from the tribunal dated 30 November 2016 confirming the Tribunal had not received the respondent’s bundle. The appellant then emailed the Tribunal the following day, 1 December 2016, to state that, although he had requested an oral hearing in his notice of appeal, he now wanted a hearing on the papers. The appellant had the benefit of legal advice and would no doubt have been told the essence of **SM & Qadir**, namely that the evidential burden was initially on the respondent in the appeal and that the burden of proof would only pass to the appellant if the respondent had discharged it; to do that she would have had to adduce evidence to support her position in her reasons for refusal of leave to remain. She would have to produce, at the least, the generic evidence to which reference is made in **SM & Qadir**. The respondent had failed to adduce that evidence by the

deadline in the notice of directions issued on 11 October 2016. Nor did the respondent comply with Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which requires the respondent to provide her evidence “within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal”. Thus the respondent had not complied with either of those provisions.

16. The appellant was entitled to assume, given the failure of the respondent to adduce the generic evidence required, that he did not need to provide further evidence in support of his appeal. In particular, it was not unreasonable for him to assume that the appeal could be heard on the papers, in the absence of any evidence from the respondent. I am in no doubt that his decision to request that the hearing be heard on the papers was for that reason; the timing of the correspondence between his solicitors, himself and the tribunal supports this.
17. In the absence of challenge, I accept the appellant and his solicitors did not receive the fresh directions issued by the tribunal on 16 December 2016; these were initiated by the tribunal as a result of the appellant’s decision to request a hearing on the papers.
18. I have considered whether the appellant should have responded to the receipt of the respondent’s bundle on 5 January 2017, for example by requesting an oral hearing. However, I consider that, irrespective of whether that was an option for the appellant, it was incumbent on the FTTJ to consider the reason why the appellant had requested a hearing on the papers. He did not take into account that the appellant’s request had followed an exchange of correspondence with the tribunal to ascertain whether the respondent’s bundle had been received. I am satisfied that, had he taken that into account, he might have considered whether to adjourn the hearing to establish two issues: whether the appellant still wanted the hearing to be on the papers and whether the appellant wanted to produce evidence of an explanation by way of response to the generic evidence (pursuant to **SM & Qadir**).
19. The power to adjourn the hearing was in Rule 4(3)(h). Also relevant is Rule 2 which sets out the overriding objective and the parties’ obligation to co-operate with the Tribunal. The respondent failed to abide by the Rules and the directions issued in October 2016. The FTTJ was required to deal with the appeal fairly and justly.
20. This appeal was a matter of considerable importance to the appellant who had been accused by the respondent of deception, an allegation which would have far-reaching consequences for the appellant, not only in respect of his right to remain or enter this country.
21. The issue in this case, as Ms Ahmad rightly submitted, is whether the appellant has had a fair hearing. I am satisfied he has not: he sought a hearing on the papers in the reasonable belief that the tribunal did not have any evidence from the respondent and in the reasonable assumption that the appeal was likely to be successful in the absence of such evidence. The FTTJ failed to take into account the reason for the appellant’s decision to request a hearing on the papers. Indeed he drew adverse inference from the appellant’s failure to participate in an oral hearing finding that the appellant did not take the test [14]. He stated that “The fact the appellant did not attend and was therefore not available to be tested on any of this, means that the evidence is all one way. It follows that I am satisfied that the respondent has established on the balance of probabilities that the appellant did not take the test”. Thus FTTJ has failed to give any consideration to the appellant’s documentary and witness evidence which was before him.

22. For these reasons I am satisfied that the FTTJ erred in failing to appreciate the reason the appellant had requested an oral hearing and inappropriately drawn an adverse inference from the appellant's non-attendance. That was a procedural error which amounts to an error of law. The appellant should have been given the opportunity to address the late evidence of the respondent to the effect that the test had been taken by a proxy. The error is material because the outcome of the appeal might have been different: the FTTJ failed to give any consideration at all to the evidence of the appellant on the grounds that it had not been tested. The same might be said of the respondent's witness statements yet the FTTJ gave them evidential weight whereas he gave none to the witness statement of the appellant.
23. The parties' representatives agreed that, in the event of one or more material errors of law, the matter should be remitted to the First-tier Tribunal for a fresh hearing. That is an appropriate course given the nature of the errors. The appellant is entitled to a fair hearing.

Decision

24. The making of the decision of the First-tier Tribunal involved the making of material errors on law and procedure. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ N M Paul.

A M Black

Deputy Upper Tribunal Judge

Dated: 24 November 2017

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black

Deputy Upper Tribunal Judge

Dated: 24 November 2017