



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

Appeal Number: IA/30082/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 October 2017**

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

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MALIK UMER JAVED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, instructed by Law Lane Solicitors

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

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Emerton (the judge), promulgated on 25 January 2017, in which he dismissed the Appellant's appeal on all grounds. That appeal had been against the Respondent's decision of 7 August 2015, refusing an application for further leave to remain in the United Kingdom. The Respondent's decision was essentially based upon an allegation that the Appellant had fraudulently obtained a TOEIC English language certificate from ETS.

The judge's decision

2. The Appellant did not attend the hearing before the judge. At paragraphs 4 to 7 the judge considered the issue of whether he should proceed with the hearing in the Appellant's absence. He noted that ATM Law were then on record as being the Appellant's representatives and that notice of hearing had been sent to the relevant address (that being the address of the representatives, the Appellant not having provided a home address of his own) on 12 September 2016. The judge noted that the appeal had been adjourned once before on the basis of lack of court time. The Presenting Officer had asked for the hearing to proceed in the Appellant's absence. The judge concluded that this is what he would do.
3. In paragraph 28 onwards the judge considers the merits of the case and concludes that the Respondent had discharged the evidential burden resting upon her. In the absence of any evidence from the Appellant, the judge goes on to conclude that he had not provided any plausible rebuttal of the Respondent's allegations. In light of this the judge was satisfied that the Respondent had, in a sense by default, discharged the legal burden of proving that the Appellant had acted dishonestly by obtaining an English language certificate fraudulently and submitting it with a previous application. In consequence of this conclusion the judge goes on to decide that the Respondent's decision was proportionate with reference to Article 8.

The grounds of appeal and grant of permission

4. The grounds of appeal assert that the Appellant had never received notice of the hearing because his previous representatives (ATM Law) had failed to inform him of the relevant date, and that he had not in fact directly received a notice. It is said that there was procedural unfairness by the judge. The second ground of appeal relates to the ETS issue.
5. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 22 August 2017 on the basis that it was arguable that procedural unfairness had occurred.

The hearing before me

6. At the outset of the hearing I indicated to Mr Turner that there appeared to be little evidence from the Appellant on which he could potentially make out his ground of appeal that there had been procedural unfairness. Mr Turner asked for time to take further instructions and I therefore put the matter back in my list.
7. When the appeal was called back on later in the morning Mr Turner confirmed that it was the Appellant's case that he had never received notice of hearing or been informed of the hearing date by ATM Law. On instructions Mr Turner told me that the Appellant had himself called the First-tier Tribunal (the Tribunal) in early January 2017 and had been told that his hearing was not yet listed. The Appellant had told Mr Turner that he had in fact later received the Tribunal decision himself. Mr Turner

referred me to the Appellant's witness statement contained in the new bundle, in particular pages 28 and 29.

8. Ms Ahmad submitted that the burden was on the Appellant to make out his ground of appeal and he had failed to do so. The notice of hearing had been sent out in September 2016 to the only address provided by the Appellant, namely that of his former representatives, ATM Law. There was an inconsistency in what the Appellant now said as to whether he called the Tribunal in January or February 2017. In any event, it was simply not plausible that the Tribunal would have misled the Appellant by telling him that his hearing was not listed. There was no evidence of any contact with ATM Law as to the allegation that they had failed to inform the Appellant of his hearing date or that a complaint had been made against this firm. I should not take the Appellant's evidence at face value as regards his assertion in the witness statement. I was referred to Rules 28, 26 and 12 of the Tribunal's Procedural Rules. In this case there had been no unfairness.
9. In reply Mr Turner said the following. The Appellant had not been obliged to provide the Tribunal with a home address and he had relied upon his former representatives telling him about the hearing date. He had done all that he could. It was suggested that the judge could have telephoned either the Appellant or his former representatives on the day of the hearing to check that he (the Appellant) was aware of the hearing. Mr Turner suggested that it seemed as though the notice of hearing had got lost in the post or that the former representatives had somehow mislaid it. Mr Turner suggested that by using First-Class post there was always a danger that letters could go missing. Mr Turner emphasised that the Appellant had had nothing to gain by failing to attend his hearing.
10. I reserved my decision on error of law.

Decision on error of law

11. I conclude that the Appellant has not made out his challenge to the judge's decision based upon procedural unfairness. There are no material errors of law in the judge's decision. My reasons for his conclusions are as follows.
12. First, fairness is always at the core of any question involving possible procedural irregularity.
13. Second, it is for the Appellant to make out an assertion that there has been material procedural unfairness in any given case. This includes establishing the underlying factual basis of a challenge.
14. Third, there are a number of significant obstacles in the Appellant's path as regards his ability to show that unfairness in fact occurred.
 - (i) At the material time ATM Law were on record as the Appellant's representatives;

- (ii) The only address ever provided to the Tribunal (having checked the file with great care) was that of ATM Law. The Appellant had never provided a home address. That was a matter for him, but the consequence was that any notice of hearing would not have been sent to him at home;
- (iii) The assertion in the grounds that he did not receive a notice of hearing directly is therefore misconceived;
- (iv) The notice of hearing containing the date of 17 January 2017 (that being the hearing date on which the judge proceeded to decide the appeal in the Appellant's absence) was sent out by First-Class post to the address on file (being that of ATM Law) on 12 September 2016. There is nothing on file to suggest that notice was returned undelivered. There was certainly no obligation upon the Tribunal to use Recorded Delivery. It is clear that there had been compliance by the First-tier Tribunal with Rule 26 of the Procedure Rules, in conjunction with Rule 12(4);
- (v) It is also clear that the judge was entitled to conclude that Rule 28(a) had been complied with;
- (vi) There is no reliable evidence whatsoever of any attempt by the Appellant, or indeed those now representing him, to contact ATM Law in respect of their alleged failure to inform the Appellant of the date of hearing. Such a failure would be a very serious matter and it is in my view significant that this firm has not been contacted in any way and asked for a response to the allegations now relied upon by the Appellant (see BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311);
- (vii) The Appellant's assertion that he telephoned the Tribunal itself only to be told that his hearing was yet to be listed is, I find, implausible and unreliable. His instructions to Mr Turner at the hearing, namely that he called in early January 2017, is on the face of it inconsistent with the assertion in paragraph 12 of his statement that he called the Tribunal in early February of that year. Further, it is highly improbable that the Tribunal would have so clearly misled the Appellant by stating that his appeal was yet to be listed when (if he had called in early January) the appeal was clearly listed and was pending at that time, or (if he called in February) to have failed to inform him that the appeal had in fact already been heard. There is no indication on file that any such communications took place, and the Appellant has failed to provide any supporting evidence of his own in support of his bald assertion;
- (viii) There was clearly no obligation upon the judge to telephone the Appellant and/or ATM Law on the day of the hearing to enquire as to the Appellant's non-attendance;
- (ix) The point made about the absence of an Appellant's bundle being supportive of the assertion that the Appellant was not aware of

his hearing date is undermined by the fact that his appeal had been originally listed for 26 August 2016 but had been adjourned just two days beforehand because of lack of court time. A bundle could and should have been prepared and served prior to that hearing. The failure to do so indicates that the Appellant was not engaged in the Appellate process at that time. At most it is of neutral affect;

(x) Mr Turner's suggestions that post may have got lost on route to the solicitor's, or that the notice may have been mislaid by the firm once received, are all completely speculative.

15. I appreciate Mr Turner's point that the Appellant might not have benefited in any particular way by failing to attend, but this point in and of itself does not take the Appellant's case very much further at all. People would only very rarely indeed have anything to gain from non-attendance. It may be that the Appellant decided not to attend because he believed he was going to lose his appeal at that point. That is speculative, but at the same time not a material consideration for me. I have to decide whether the judge acted fairly in proceeding in the Appellant's absence.
16. The cumulative effect of all the matters listed in paragraph 14, above, point very firmly in the direction of a conclusion that there has been no operative procedural unfairness in this case.
17. The judge's findings and conclusions on the merits were, on the evidence before him, entirely open to him.
18. There is no error of law in this case and the judge's decision shall stand.

Postscript

19. On 24 October, a week after the hearing before me, the Appellant's representatives sent in two items of new evidence to the Upper Tribunal correspondence team, asking for these to be considered by me prior to making my decision in this appeal. There was no indication at the hearing that any new material would be forthcoming. I had not given permission for this to occur. The new evidence was not accompanied by an application under rule 15(2A) of the Upper Tribunal's Procedure Rules. Nor is there any indication that this evidence has been served on the Respondent. Frankly, I am distinctly unimpressed by the representative's approach.
20. In these circumstances, in the first instance I refuse to admit the new evidence.
21. However, for the sake of completeness, I make it very clear that even if it had been admitted, it would make absolutely no difference to the outcome in this case whatsoever.
22. The first item of new evidence is what appears to be an attendance note completed by somebody at the Appellant's current solicitors and dated 1 February 2017. For reasons which are unexplained, large parts of the note

are redacted, a fact which clearly does not assist the overall reliability of the document's contents.

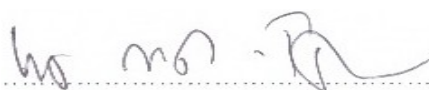
23. The note states that the Appellant had apparently telephoned the First-tier Tribunal during "the meeting" (the date, location, and purpose of the "meeting" is omitted), and that he was told that his appeal had not been re-listed following an earlier adjournment.
24. I have already dealt with the issue of the telephone call previously in my decision. The note adds nothing of substance to this matter. Aside from the vagaries of the note and the unexplained redactions, there is no statement of truth from the author, the February date is still inconsistent with what the Appellant told Mr Turner on the day of the hearing before me, and it remains highly unlikely (in the absence of cogent evidence to the contrary) that the First-tier Tribunal would have so badly mislead the Appellant in the course of the alleged telephone call.
25. The second item of evidence is a letter, dated 24 October 2017, purporting to raise a complaint with ATM Law. This letter was obviously prompted by the complete absence of any such correspondence with the previous representatives in support of the appeal to the Upper Tribunal. This belated attempt to fill the gap reflects poorly on the Appellant and adds nothing to his case.

Notice of Decision

There are no material errors of law in the decision of the First-tier Tribunal. That decision shall stand.

The Appellant's appeal to the Upper Tribunal is therefore dismissed.

No anonymity direction is made.

Signed 

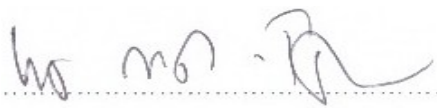
Date: 21 October 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed 

Date: 23 October 2017

Deputy Upper Tribunal Judge Norton-Taylor