



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

Appeal Number: IA/28951/2015

THE IMMIGRATION ACTS

**Heard at Field House
Heard on 8th of May 2017
Prepared on 9th of May 2017**

**Decision & Reasons Promulgated
on 10th Of May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR ASIF SALEEM KHAN CHEEMA
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar of Counsel
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 23rd of October 1988. He appeals against a decision of Judge of the First-tier Tribunal Anstis sitting at Taylor House on 24th of June 2016 in which he dismissed an appeal against a decision of the Respondent dated 7th of August 2015. That decision was to refuse the Appellant's application to vary leave to remain

in the United Kingdom and a consequent decision to issue directions for removal.

2. The Appellant arrived in the United Kingdom on 15th of May 2011 with leave to enter valid until 1st of June 2013. He was subsequently granted further leave to remain until 27th of June 2014. On that day the Appellant applied to vary his leave and it was the refusal of this application which gave rise to the present proceedings. The Respondent refused the Appellant's application on the basis that in an earlier application of 28th of May 2013 (which resulted in the extension granted until 27th of June 2014) the Appellant had relied on a TOEIC certificate from ETS and that on the basis of the information provided to the Respondent by ETS the Respondent was satisfied that that certificate had been fraudulently obtained.
3. As false documents had been submitted the application was refused under paragraph 322 (2) of the Immigration Rules. This subparagraph provides grounds on which leave to remain and variation of leave to enter or remain should normally be refused, that is that there is an element of discretion. The grounds will be made out where there has been the making of false representations or a failure to disclose any material fact for the purpose of: obtaining leave to enter or a previous variation of leave or obtaining documents from the Respondent or a third party required in support of the application for leave to enter or a previous variation of leave.
4. The burden of proof of establishing that rests upon the Respondent and whilst the standard of proof is the usual civil standard of balance of probabilities, the more serious the allegation the more cogent the evidence to support it must be. That however was not the only ground on which the Appellant's application had been refused. He had also been refused on the basis that the sponsor who provided the certificate of acceptance for studies ("CAS") relied upon by the Appellant in his application was not listed as a registered sponsor at the time the application for leave was considered by the Respondent and thus the CAS was not valid.

The Proceedings at First Instance

5. The Appellant (who was unrepresented at the time) appealed against the Respondent's decision in brief grounds at paragraph 8 of form IAF1 -1. He did not agree with the Respondent's allegation that he had employed a proxy test taker he had never used any deception. His grounds of appeal did not refer to the 2nd objection to his application, the lack of a CAS.
6. Following receipt of the application to appeal the Tribunal sent out a notice on 23rd of May 2016 that the Appellant's appeal would be heard the following month on 24th of June 2016 at Taylor House. The day before the hearing the Appellant made an application for an adjournment sending a

fax at 2.33pm to the Tribunal. He gave two reasons why he wanted an adjournment. The first was that his mother had died in Pakistan on 16th of June, a week before, and he was unable to travel to Pakistan. He had not had a chance to see her one last time. As a result he said he was going through a deep trauma, sadness and depression. The 2nd reason he gave was that due to the death of his mother he was suffering bad health with a high temperature, nausea and diarrhoea. He appended a death certificate for his mother and a letter from the Appellant's GP dated 22nd of June 2016. This confirmed the Appellant's attendance at the surgery on 22 June (the day before) and that the GP was arranging investigations for the Appellant symptoms of abdominal pain with fever and insomnia. According to the GP it was unclear how long the Appellant symptoms would take to resolve but he planned to review the Appellant in a week adding at the end "at this point we can decide if further time off is required". I take that to mean that the GP had signed the Appellant off from work for one week.

7. In the remainder of the written application the Appellant had argued with the Respondent's decision to refuse his application because of the allegation of a proxy test taker saying it was beyond doubt that he the Appellant had a very good command of the English language. Again, no reference was made to the refusal to grant leave because of an invalid CAS.
8. The application for an adjournment went before the Designated Judge at Taylor House who made a decision the same afternoon on 23 June in the following terms: "These sad events are regrettably no reason to adjourn. Adjournment refused". As the Appellant had paid the fee for an oral hearing, the case was listed before Judge Anstis although the Respondent for her part consented to the matter being determined on the papers by telephone and thus there was no representation for either for either party when the matter came before the Judge.
9. At paragraph 7 of his determination the Judge noted that there was no further application to adjourn before him. He directed himself in accordance with rule 28 of the Procedural Rules that if a party fails to attend the hearing the Tribunal may proceed with the hearing if the Tribunal is satisfied that the party has been notified of the hearing and considers that it is in the interests of justice to proceed with the hearing.
10. At paragraph 10 the Judge gave his reasons why he was not prepared to adjourn the matter stating: "there has previously been application for adjournment which has been refused by the Tribunal and there is no renewed application for an adjournment before me. Rule 2 of the Tribunal's Rules of procedure sets out the overriding objective, which includes "avoiding delay, so far as compatible with proper consideration of the issues". In those circumstances, and bearing bearing in mind the need to avoid delay, I consider it is in the interests of justice to proceed with the hearing".

11. He referred to the Appellant not submitting any evidence relevant to the substance of the appeal and referred to the Respondent's bundle which included the look up tool that showed that the Appellant's test result was invalid. He quoted at some length from the case of **SM [2016] UKUT 229** and noted that the Upper Tribunal had said in that case that every case belonging to the TOEIC stable would invariably be fact sensitive. Every appeal would be determined on the basis of the evidence adduced by the parties. In the instant case before him the Judge noted that the Respondent's evidence appeared to be substantially the same as that relied on in **SM** and he saw no reason to depart from the Upper Tribunal's findings that this was sufficient to satisfy the evidential burden on the Respondent. As the Appellant had submitted no evidence to discharge that evidential burden it must follow that his appeal on that point cannot succeed.
12. At paragraph 18 the Judge went on to consider the 2nd ground of refusal stating: "beyond that, there is the additional difficulty in this case that the Appellant did not have a valid CAS, which on its own would be enough to mean that his application must fail. The Appellant has no answer to this. Without a valid CAS his application could not succeed and his appeal cannot succeed." The Judge noted that Article 8 was not engaged in this case and dismissed the appeal.

The Onward Appeal

13. The Appellant appealed against this decision concentrating on the refusal of the application for an adjournment. He referred to the Presidential guidance note of 2014 that a factor weighing in favour of adjourning on appeal even at a late stage would be sudden illness or other compelling reason which prevented the party from attending a hearing. The guidance went on to say that normally such a reason should be supported by medical or other relevant evidence unless there was insufficient time to obtain such evidence. However, where there was no likelihood that the party would be able to attend the hearing within a reasonable period the Tribunal might proceed in absence where the Tribunal considered that this was in the interests of justice in terms of Rule 28.
14. Subsequent case law including **SH** and **Nwaigwe [2014] UKUT 00418** had stressed that the test of whether to adjourn was one of fairness. The First-tier Tribunal Judge should have considered the Appellant's mother's sudden death and the medical circumstances and adjourned. The Appellant was unable to attend court and the decision under appeal had been made without proper consideration. As a result of this failure the Appellant had been deprived from the benefits he would have acquired namely being able to concentrate and continue his studies.

15. The Appellant denied that he had ever used deception. His test results were genuinely obtained. He was not aware of any malpractice during the test. He had a very good command of the English language. The Respondent's allegations were made with insufficient clarity. He had qualifications which proved he was competent to pass the English language test. The grounds concluded with further comments on the refusal to adjourn but noticeably at no point did the grounds of onward appeal deal with the 2nd reason why the Appellant's appeal had been dismissed namely the fact that the Appellant had no valid CAS.
16. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal O'Garro on 20th of October 2016. She refused permission to appeal noting that in a well-reasoned decision the Judge had given adequate reasons at paragraph 10 why he was satisfied that the appeal could be justly determined in the absence of the Appellant. There was no obvious error of law in the Judge's decision.
17. The Appellant renewed his application for permission to appeal to the Upper Tribunal in broadly similar terms to the application which had not succeeded in before the First-tier. Again, the application to the Upper Tribunal did not in deal in any way with the refusal because of no valid CAS. The application to the Upper Tribunal for permission to appeal came on the papers before Deputy Upper Tribunal Judge Sheridan on 23rd of March 2017. In granting permission to appeal he wrote that the question for the Judge to address in considering whether to adjourn was whether the appeal could be justly determined in the Appellant's absence see **Nwaigwe**. It was unclear if the Judge had considered this and therefore there was an arguable error of law. Permission to appeal was granted on all grounds.
18. The Respondent replied to this grant of permission by letter dated 11th of April 2017. The Respondent said she had not seen any documents showing that the Appellant was unwell and therefore reserved her position on that point. The Judge provided full reasons why he was satisfied that the appeal could be justly determined in the Appellant's absence which was allowed under the Procedural Rules. The Judge had directed himself appropriately and had all the material before him when making a decision which he was entitled to make.

The Hearing Before Me

19. As a consequence of the grant of permission the matter came before me to determine whether there was an error of law in the First-tier determination such that it fell to be set aside. Counsel for the Appellant relied upon his skeleton argument which referred to the death of the Appellant's mother and that as a result the Appellant's own health took a turn and he started to suffer from high-temperature, nausea and diarrhoea. The skeleton argument referred to the Upper Tribunal decision of the **Nwaigwe** to argue that it was perverse to continue with the

appeal in the absence of the Appellant. There was judicial criticism of cases brought by the Respondent when alleging proxy test takers. If the Respondent had satisfied the initial burden by showing that a prima facie each case had been made out the burden swung to the Appellant to provide an innocent explanation. By proceeding in the Appellant's absence the First-tier deprived the Appellant of the opportunity to answer questions relating to his test in 2013 and therefore the opportunity to put forward an innocent explanation for what had happened.

20. The allegation which the Appellant appealed against was a serious one with Draconian consequences which included a lengthy period of exclusion from the United Kingdom and the real possibility of causing the Appellant difficulties in other areas of his life. The importance of the proceedings was a factor that required consideration when deciding whether an adjournment was appropriate. The decision to proceed under rule 28 of the Procedure Rules constituted an error of law on the part of the Judge. The grounds also repeated the Presidential Guidance note which I have referred to above (see paragraph 13 above).
21. In oral submissions it was argued that there was a relatively narrow point in issue: whether the First-tier could proceed in the absence of the Appellant. It was not disputed that the Appellant was aware of the hearing. Paragraph 10 of the determination did not show sufficient consideration of the issue. There was a minimum one year disqualification for the Appellant if the decision at first instance remained. Had the Appellant been able to attend he would have put forward his case. The Judge was aware that there had been an application for an adjournment. There was no medical evidence to show that the Appellant's psychological problems.
22. In reply, the Presenting Officer argued that the application for an adjournment had been made against a background that no evidence had been submitted by the Appellant for the appeal. In any event the appeal had also been refused because the Appellant did not have a valid CAS, see paragraph 18 of the determination. Therefore the question of an adjournment in relation to the TOEIC issue was irrelevant as the appeal was doomed to failure. In response to that last point counsel said he had no instructions on the CAS issue but if the Respondent did not succeed on the dishonesty issue the Appellant would be able to make a further application while he continued to enjoy section 3C leave.

Findings

23. There are 2 separate issues in this case. The first is whether the Judge should have adjourned the hearing or whether he was entitled to proceed as he did. The 2nd quite separate issue is whether the Appellant has any explanation to counter the decision of the Respondent to refuse to grant the Appellant leave to remain because the Appellant did not have a valid CAS.

24. That last point can be very simply answered. The Appellant has no answer to the objection of the Respondent. The Presenting Officer was quite correct in his submission to me that this was an appeal that was always doomed to fail. At no point has the Appellant ever said that he had an answer to the objection that he had no CAS. He did not make that point in his appeal against the Respondent's decision, he did not make that point in his letter asking for an adjournment or in the statement he made in preparation for the hearing before me (which largely dealt with the adjournment request and the Appellant's knowledge of English). Counsel indicated in the course of oral submissions that he had no instructions on the point.
25. There was no error of law on the Judge's part to dismiss the Appellant's appeal for failure to comply with the immigration Rules by not having a valid CAS. The issue is thus whether it makes any difference whether the Judge did or did not adjourn the matter. If it did make a difference was the Judge nevertheless entitled to adjourn? If it did make a difference and the Judge was not entitled to adjourn then there would be a material error of law such that the decision of the First-tier should be set aside. As I indicated during the course of submissions if the decision of the First-tier Tribunal was set aside on the grounds of procedural unfairness the correct course of action would be to remit the appeal back to the First-tier to be heard again. On the other hand if there had been no procedural unfairness then in any event the decision of the First-tier Tribunal must stand since the Appellant's appeal could not succeed.
26. I do not accept the argument that the decision of the First-tier should be set aside simply because the Appellant might otherwise have difficulties in making a fresh application with a valid CAS in the future. If the Appellant was not entitled to leave to remain because of the absence of a valid CAS, the Appellant could make such application as he sees fit (but it would not carry a right of appeal in the event of a further refusal from the Respondent regardless of whether there was or was not an allegation of proxy test taking).
27. It does not matter whether the Judge adjourned the case or not given that this was a hopeless appeal which the Appellant himself was not in effect contesting since at no point has he sought to argue that he could meet the objection of no valid CAS. However even if I am wrong on that point, I do not consider that the Judge made a material error of law in proceeding with the appeal in the absence of the Appellant.
28. Firstly, the Appellant did not produce any evidence with his application for an adjournment to show that he was unfit to attend the court. There was no psychological evidence produced either at the time or since to show that the Appellant was so upset by what had happened to his mother that he was quite incapable of presenting a case in court. Even if there was no time before the hearing, which I do not accept because it could have

been mentioned by the GP in his letter, there has been ample time since the hearing in the run up to the appeal hearing to obtain some psychological evidence.

29. It is clear that the Tribunal carefully and not without sympathy considered the adjournment request when a decision was made by the Designated Judge on 23rd of June that what were described as the sad events (that is the passing of the Appellant's mother) was regrettably no reason to adjourn. That was a judicial decision and there was no reason why the First-tier Tribunal Judge at the hearing should have reversed that decision of the Designated Judge. The First-tier Tribunal Judge's view was that there was no fresh application before him to adjourn following the refusal by the Designated Judge. For all that the First-tier Tribunal Judge knew the Appellant had accepted the decision of the Designated Judge.
30. That of itself is a powerful consideration but even if it is not, the Judge was faced with a situation where he had no medical evidence to show that the Appellant was unfit to attend court. He had evidence that the Appellant had had a stomach upset of some sort and had seen the GP about that but the GP had not said that the Appellant was unfit to attend. As I have pointed out there was no evidence even from the GP confirming that the Appellant was distressed or psychologically incapable of presenting his case. In the absence of a reasonable explanation for the Appellant's absence the Judge was quite entitled to proceed under Rule 28 where the Appellant had been notified of the hearing.
31. In addition to the absence of medical evidence there was an absence of the Appellant's evidence. The Appellant had had over a month to prepare for the hearing and the events to which he referred had only occurred in the last week of that month. The Appellant had had ample time before that to begin his preparation for the appeal but there is no evidence to show that he had done anything during that time. The Judge was thus faced with a situation where there was an incomplete application for an adjournment which had been rejected and no further application made. There was little to show to what extent the Appellant had engaged in the appeal proceedings. Even now it cannot be shown that the Appellant has properly engaged in the appeal proceedings since he still cannot rebut the Respondent's charge that there was no valid CAS.
32. Any refusal of an application for leave could be said to have serious consequences for the individual concerned but the Appellant has known throughout that his appeal was not going to succeed because he could not produce a valid CAS. That he feels aggrieved that his application for an adjournment was refused is in my view neither here nor there. No useful purpose would have been served by adjourning a hopeless appeal. Given that the application for the adjournment was itself a weak one for the reasons I have given (because unsupported by appropriate medical evidence), the Judge was correct to proceed with the appeal on the day.

33. Permission to appeal was granted on the basis that the determination arguably did not reveal that the Judge was aware of or had directed himself that the test of whether to adjourn following **Nwaigwe** was one of fairness. A careful reading of paragraph 10 of the determination shows this not to be the case. The Judge was fully aware of the overriding objective. It was not necessary for him to set out the whole of Rule 2 of the Procedural Rules to demonstrate that. What he referred to was Rule 2(2)(e) which defines what is meant by dealing with the case fairly and justly that is avoiding delay so far as compatible with proper consideration of the issues.
34. I do not consider there is any difference between the ratio in **Nwaigwe** and the overriding objective as expressed by Rule 2. The Rule emphasises that the case must be dealt with fairly indeed it mentions that twice because it goes on to refer to a “proper consideration of the issues”. An unfair hearing is clearly not a proper consideration of the issues. The Judge was fully aware of the requirement that the test for an application for an adjournment was one of fairness. It is correct that the Judge wished to avoid unnecessary delay, that was particularly so given that the Appellant’s appeal was bound to fail as he had no answer to the CAS point. Nevertheless, fairness still required the Judge to consider whether there should be an adjournment and whether if no adjournment was granted the Appellant would be deprived of a fair hearing. The Judge was aware of those issues hence his quotation from the overriding objective. I do not consider there was any breach of the ratio in **Nwaigwe**.
35. Even if I was of the view that there was an error of law in not adjourning the case, I would not have set aside the decision of the First-tier because the Appellant has no case (regarding the CAS) for the reasons I have given. The decision of the First-tier did not therefore involve the making of an error of law and I uphold the decision to dismiss the Appellant’s appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant’s appeal

Appellant’s appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 9th of May 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

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

Signed this 9th of May 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge