



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

Appeal Number: PA/12131/2016

THE IMMIGRATION ACTS

**Heard at Bradford
On 7th December 2017**

**Determination Promulgated
On 11th December 2017**

Before

FIRST-TIER TRIBUNAL JUDGE KELLY

Between

MR MUSTAFA ALTAYEB MUSTAFA AL AGAB

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain, Counsel instructed by IAS (Sheffield)

For the Respondent: Mr M Diwync, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Mr Mustafa Al-Tayeb Al Agab against the decision of Judge Caswell, promulgated on the 6th April 2017, to dismiss the appeal against refusal of his Protection Claim.
2. Given the ground upon which permission to appeal has been granted, it is unnecessary to recite the basis of the Protection Claim. It is however necessary to outline the history of the proceedings.

3. The appeal was originally listed for a full hearing on the 3rd January 2017. That date was vacated at the request of the appellant's representatives with a view to affording them more time to prepare for the hearing. On the 14th December 2016, the Tribunal gave written notice that the final hearing would take place on "Thursday, 30 March 2017". That notice was sent by first class post to both the appellant himself and to his representative. The appellant failed to appear on that date. The judge noted the following at paragraph 1 of her decision:

"By 11.20 am on the day of the hearing, the Appellant had not arrived. No messages from him had been received. Ms Dunne [the appellant's representative] informed me that the office had tried him several times on his mobile phone, and the calls went straight to voicemail. They had also sent him a text asking him to ring the office, with no response. Ms Dunne said she did not have instructions to ask for an adjournment, and that she was surprised and disappointed at the Appellant's failure to attend."

The judge thereafter concluded that the interests of justice did not require her to adjourn the hearing and so she proceeded to hear it in the appellant's absence.

4. At 16:15 hours on the following day, Friday the 31st March 2017, the Tribunal received a facsimile message from the appellant's representatives stating that they had been instructed that the appellant had attended the Tribunal on that day in the mistaken belief that this was the day his appeal was due to be heard. It concluded:

'We therefore ask that no adverse credibility findings are made in respect of his non-attendance yesterday.'

5. For the purposes of this appeal, the critical findings of Judge Caswell can be found at paragraph 24 of her decision:

"Even accepting from Peter Verney's report that there are instances where the Respondent may have drawn adverse conclusions with insufficient basis, the fact remains that the Appellant has failed to attend for his appeal, support his witness statement, put himself forward for cross-examination, and answer any concerns. If there had been an explanation for this absence, I would have been able to ascribe an innocent explanation for this, but none was forthcoming. In the circumstances, bearing in mind that credibility is in issue, that the expert cannot conclusively say that the Appellant is Berti, and when the Appellant has failed to attend to support his own appeal, I conclude that the Appellant has failed to discharge the burden of proof upon him to establish his case, even to the lower standard."

6. Reflecting the grounds that had been submitted on behalf of the appellant, Upper Tribunal Judge Plimmer gave permission to appeal in the following terms:

"1. It is arguable that in finding that the appellant's absence from the hearing fundamentally undermines the reliability and truthfulness of his account, the First-tier Tribunal acted unfairly in failing to

take into account the fax dated the 31 March 2017 explaining the reasons for this absence.

2. The First-tier Tribunal decision was signed on 3 April 2017 and promulgated on 6 April 2017 and promulgated on 6 April 2017, after receipt of the fax.”
7. Despite the erudite submissions of Mr Hussain, I am not persuaded that the failure of the Tribunal to take account of the contents of the facsimile message, received in the late afternoon of the day after the hearing, can properly be described as ‘unfair’. This was evidence that post-dated the hearing. It is thus at least arguable that it would have been an error of law to take account of it without reconstituting the hearing or, at the very least, giving the respondent an opportunity to respond to it in some other way. I am also not blind to the realities of the situation. As a fee-paid judge, Judge Caswell doubtless took the file away at the conclusion of her sitting on the 30th March 2017 with a view to preparing her written decision. It would not therefore have been possible for the administrative staff to place the facsimile message on the file at the time when it was received. The first opportunity to do so would therefore have been when the judge returned the file to the Hearing Centre. This would in all likelihood have been after she had remotely submitted her decision for promulgation at an earlier date. It would in my view place an impossible burden upon the administrative staff if they were required to check every communication that arrived after a hearing of an appeal in order to assess whether it was necessary to alert the judge to its contents and, if so, to forward it to her. It was not in my view ‘unfair’ for either the administrative staff or the judge to assume that all evidence that was relevant to the issues in the appeal had been submitted at or prior to the time of the hearing. Insofar as the appellant’s absence at the hearing weakened what otherwise would have been the strength of his appeal, he may truly be said to have been the author of his own misfortune. I note that the representatives appeared to accept that this was the case given that they did not ask for the hearing to be reconstituted to allow for the appellant to give oral testimony. Quite properly, they confined themselves to a request that no adverse inferences be drawn from his absence at the hearing when assessing the credibility of his claim.
8. I nevertheless consider that the judge adopted a flawed approach to the appellant’s absence at the hearing, regardless of the explanation for it of which I am satisfied she was unaware. The error lies in the fact that the judge appears to have attached weight to the lack of an explanation for the appellant’s absence in her assessment of the credibility of his claim. An explanation for the appellant’s absence would clearly have been necessary to support any application that may have been made for an adjournment to enable him to attend at a later date. However, no such application was made. The fact of the appellant’s absence was plainly relevant to his ability to substantiate his claim before the Tribunal. One of the consequences of his absence was that the judge was bound to place less weight upon his written evidence than may have been the case had he given oral testimony that had been tested in cross-examination. It is

important to emphasise, however, that such reasoning does not involve the drawing adverse conclusions from the appellant's absence; it merely acknowledges that his absence has reduced his ability to substantiate his claim. Much of what is said at paragraph 24 follows this permissible line of reasoning. However, the judge also appears to have speculated upon the reasons for (as opposed to the fact of) his absence when assessing the credibility of evidence. Thus, the judge refers to the fact that she may have been able "to ascribe an innocent explanation for this absence" had one been forthcoming. The clear implication of this is that the only conclusion to be drawn from the appellant's failure to provide an "innocent explanation" for his absence is that none exists. However, the difficulty with such reasoning is that it makes assumptions about the appellant's ability to provide an explanation for his absence by failing to take account of the possibility that the cause of the appellant's absence may also be the cause of his inability to communicate to his representative and to the Tribunal. To take an example that is very far removed from the facts of this case, a witness may sustain serious head injuries in road traffic accident whilst travelling to the hearing. In such a case, the reason for the absence of the witness is likely to be the same as his reason to communicate it to the Tribunal. In this case the appellant's failure to attend the hearing on the 30th March 2017 is said to have been that he was unaware of it. The appellant could not therefore have explained something of which he was at that time oblivious. It is therefore inappropriate for the judge to draw any adverse conclusion from the unexplained absence of an appellant. She should instead have confined herself to noting the ways in which his absence meant that he may have been less well placed to substantiate his claim. Moreover, I am unable to say to what extent the error in drawing an adverse conclusion from the appellant's failure to provide an innocent explanation for his absence infected the other (perfectly sustainable) that the judge gave for dismissing the appeal. I have therefore concluded that it should be set aside and remitted to the First-tier Tribunal, with none of the original findings being preserved.

9. I have been conscious throughout that the above error of law that I have identified differs slightly from the basis upon which permission to appeal was granted. I therefore asked Mr Diwnycz if he objected to me setting aside the decision of First-tier Tribunal for the reasons I have given in the previous paragraph. He did not.

Notice of Decision

10. The decision of Judge Caswell is set aside for error of law and the appeal is remitted to the First-tier Tribunal (not Judge Caswell) for complete rehearing with no findings of fact preserved.

Signed

Date: 8th December 2017

Deputy Judge of the Upper Tribunal D Kelly