



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006193
First-tier Tribunal No:
HU/01889/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 April 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

Yongtai Yang
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr Georget, Counsel instructed by Sabz Solicitors

For the respondent: Mr Melvin, Senior Home Office Presenting Officer

Heard at Field House on 17 April 2023

DECISION AND REASONS

1. This is an appeal against the decision issued on 2 November 2022 of First-tier Tribunal Judge Herlihy which refused the appellant's human rights claim.
2. The appellant is a national of China and was born on 3 March 1963.
3. The appellant maintains that he qualifies for leave on long residence grounds under paragraph 276ADE as he came to the UK in 2000 and also on Article 8 ECHR grounds. He applied for leave on these grounds on 4 June 2020. The respondent refused his application on 16 February 2021.

4. The appeal came before Judge Herlihy on 5 September 2022. Judge Herlihy decided to proceed with the appeal in the absence of the appellant. After the hearing she was provided with an adjournment application which had been made on 4 September 2022, the day before the hearing; see paragraph 18 of the First-tier Tribunal decision. The appellant indicated that he had only been informed of the hearing on 2 September 2022. He had sacked his legal advisers the evening before (see below) and had not been able to find other representatives. He had not been able to obtain the evidence relating to his Chinese passport which had been the basis of at least one previous adjournment. Judge Herlihy concluded that it was in the interests of justice to proceed to determine the appeal notwithstanding the appellant's absence at the hearing and the adjournment request; see paragraph 17.
5. I had some sympathy with the position in which Judge Herlihy found herself when she came to write the decision, having been provided with the adjournment application only after the hearing. The procedural history of the appeal was complicated. She was right to consider that the fact of three previous adjournments and information on the Tribunal system as to the appellant and his legal advisers having been informed of the hearing listed for 5 September 2022 were important matters.
6. However, for the error of law hearing, the appellant's new advisers provided significant further materials as directed on 15 February 2023 by Upper Tribunal Judge Owens. These documents showed that the appellant was evicted in 2021 from the Luton address which the Tribunal still had on file at the time of all of the First-tier Tribunal hearings. The materials provided showed that Zyba Law had written to the respondent about a new address in Edgware address on 31 March 2022. Mr Melvin indicated that the respondent still held the Luton address for the appellant, however. Nothing in the materials showed that Zyba Law had informed the First-tier or Upper Tribunal of the Edgware address. On the contrary, notwithstanding the email dated 31 March 2022 to the respondent with the correct Edgware address, Zyba Law appear to have informed the Tribunal on 30 March 2022 that the appellant still lived at the Luton address; see paragraph 17 of Judge Herlihy's decision.
7. Further, the materials provided in response to the direction of the Upper Tribunal showed that appellant had provided an email address to the Tribunal at a hearing before Judge Williams on 3 February 2022; see paragraph 13 of the decision of First-tier Tribunal Judge Herlihy. The appellant's new advisers, Sabz Solicitors LLP, maintained that after that hearing before Judge Williams the appellant had informed Zyba Law of a new email address and his preference for this to be used or that an email address for his sister be used. Nothing showed that Zyba Law had told the respondent or the Tribunal of these new email addresses. They were aware of them, however, shown by an email to the sister's email address on 20 June 2022. The emails on 2 and 4 September from Zyba Law to the appellant used the old email address, however, not either of the new ones. The appellant took issue with this in his email to Zyba Law dated 2

September 2022, doing so in response to a telephone call from his legal advisers, not in response to any emails from them, setting out the correct emails addresses that he had asked to be used.

8. The materials directed by Upper Tribunal Judge Owens also included an email from Zyba Law Solicitors dated 4 September 2022 to the appellant stating that they had not received any notice of hearing for the 5 September 2022 hearing until the week before and had not informed the appellant of this until late on 2 September 2022.

9. I referred to the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC):

“If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party’s right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.”

10. It was my view that the lack of clarity that Zyba Law had acted on the appellant’s instructions to inform the Tribunal of the appellant’s change of address and change of email and had not informed him of the hearing until 2 September 2022 were significant matters which was not considered by the First-tier Tribunal when deciding to proceed and to determine the appeal. The new materials showed that the failure of Zyba Law to provide these up to date contact details for the appellant were at the heart of the appellant only learning of the 5 September 2022 hearing on 2 September 2022 as well as their own action in informing him of the hearing only on 2 September 2022. It has always been the case that the appellant intended to bring witnesses and provide further information about whether he had been issued with more than one Chinese passport. It is correct that the appellant could have appeared in person at the hearing on 5 September 2022 but, given the confusion and the dispute with his legal representatives coming to a head only on the evening immediately prior to the hearing, in all the circumstances it did not appear to me that was necessarily a matter which had to lead to the First-tier Tribunal deciding to proceed with the appeal and appeal determination without his participation.

11. It was my conclusion that in all the circumstances that this was not a case of the First-tier Tribunal acting unreasonably but one of the appellant being deprived of a fair hearing and this not being so because of his own conduct, certainly not solely so. It was therefore my view that there was a

procedural unfairness such that the decision of the First-tier Tribunal should be set aside to be remade. The matters set out above should indicate that no criticism attracts to Judge Herlihy where that is so. Where primary findings of fact on paragraph 276ADE and Article 8 EHCR must be made it was my view that the appeal had to be to be remade in the First-tier Tribunal afresh; Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) considered.

Notice of Decision

12. The decision of the First-tier Tribunal discloses a procedural error and is set aside to be remade afresh in the First-tier Tribunal.

Direction

13. The appellant and/or his legal representatives are to inform the First-tier Tribunal and the respondent immediately on receipt of this decision of the up-to-date contact details for the appellant and should be wholly astute to the need to keep the Tribunal and the respondent updated in that regard in future.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 17 April 2023