



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006010
First-tier Tribunal No:
PA/01464/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 08 August 2023**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MARAA
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Patel instructed by Broudie, Canter and Jackson
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 28 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Lodato ('the Judge') promulgated on 24th May 2022, in which the Judge dismissed

the appellant's appeal against the refusal of his application for international protection and/or leave to remain in the UK on human rights grounds.

2. At [2] of the determination the Judge writes:

Preliminary and procedural matters

2. The respondent was not represented at the substantive hearing of this appeal having notified the tribunal in advance that, due to resourcing issues, she was not able to field a presenting officer. It was not suggested that the hearing should be adjourned. The underrepresented appellant did not attend the hearing either. He was notified in advance in a notice sent to his last known at home address of the date and venue of the hearing. Before the hearing started, my clerk attempted to contact him on a mobile telephone number provided with the application documents. The call went straight to voicemail. In the circumstances, I found it to be in the interests of fairness and justice to proceed in the absence of the parties and reserved my decision.
3. Thereafter the Judge proceeded to consider the evidence that was available. At [12] the Judge writes "*I have considered the evidence of material contained within the respondents hearing bundle. Despite several directions to serve in appellant's bundle, no documents were provided by him*".
4. The Judge's findings are set out from [20] of the decision under challenge. The Judge analyse the evidence given in the interviews together the refusal letter before finding at [29] that "*... I was left with profound concerns about whether the appellant's account had any relationship with the truth. His narrative of falling foul of his criminal associates was marked by inconsistency touching on matters of real substance. He has not discharged his burden to establish the essential facts of his case. It follows that his case cannot succeed either asylum or humanitarian protection grounds. It is unnecessary to assess whether a Convention reason underpins the claim or if he might benefit from internal relocation or sufficiency of protection on return because he has not established that he is at risk.*"
5. The appellant sought permission to appeal claiming it was unreasonable, unlawful, and unfair to decide the appeal without giving him the opportunity to state his case and with only input from the respondent. The original grounds argue the Judge did not consider relevant case law including *Nwaigwe v Secretary of State for the Home Department* [2014] UKUT 418 when considering the question of fairness and interests of justice in adjourning an asylum appeal. It is argued the Judge did not apply the principles under Rule 2 of the Tribunal Procedure Rules which required the Judge to have regard to the overriding objectives of justice and fairness and did not satisfy himself that notice of the appeal had been received by the appellant. It is submitted the fact the clerk's telephone call went to a voicemail indicated there were communication issues. It is argued the principle of fairness and a fair trial had not been adhered to in making the decision. The appellant argues the Judge should have adjourned the hearing giving directions for serving the notice of hearing again and seeks to make suggestions of what could have been responsible for the inconsistencies identified by the Judge.
6. Permission to appeal was refused by another judge of the First-tier Tribunal on the basis no arguable legal error was made out and the Judge's decision to proceed is adequately reasoned and sustainable. The appellant renewed the application to the Upper Tribunal. Permission was granted by Upper Tribunal Judge

Grubb on 24 January 2023, the operative part of the grant being in the following terms:

3. The judge proceeded to determine the appeal in the absence of the appellant and a representative of the respondent. The crucial issue was the appellant's credibility. The appellant was a litigant in person. The appeal had not previously been adjourned. The contact with the appellant on the day by phone was inconclusive as it went to voice-mail. It is arguable that, although recognising that the notice of hearing had been sent to the appellant's address (this is accepted in the grounds), at para [2] of his decision the judge did not fully take into account all the circumstances in determining whether the interests of justice were served by proceeding in the absence of both parties. All grounds may be argued even though the credibility challenges, without the issue of non-appearance, may be less persuasive. For these reasons, permission to appeal is granted.
7. In her Rule 24 response dated 28 February 2023 Secretary of State's representative writes:
 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
 3. The judge at the hearing took all reasonable steps to ensure that the appellant was aware of the hearing and it remains the case that the appellant has not established that he did not receive notification of the hearing. It was not unfair to proceed in these circumstances the appellant had every opportunity to engage in the process but simply did not do so.
 4. The findings of the First Tier are properly reasoned and were clearly open to them on the evidence.
 5. The respondent invites the Tribunal to uphold the decision of the First Tier.

Discussion and analysis

8. As noted in the grant of permission to appeal, documents served by the First-tier Tribunal were sent to the address provided by the appellant as his address for service. I do not find any alternative claim made out.
9. The appellant stated he received the directionless order, although on the findings of the Judge it appears he failed to comply with it, and a copy of the determination under appeal, but did not receive the notice of hearing.
10. The appellant lives in multi-occupancy NASS accommodation so it cannot be ruled out that even if notice of hearing was sent and delivered to that address that it was not taken by another.
11. In relation to the lack of response to the call to the appellant's mobile, Ms Patel confirmed that a telephone call from the Tribunal will appear on an individual's telephone as 'number withheld'. This means there is no indication for the recipient of who has made the call or opportunity to call them back. The Judge's decision records that his clerk telephoned the appellant's mobile number which went to voicemail but does not specifically state that a message was left on the voicemail. I cannot speculate and if no message was left providing a contact number it is not surprising the appellant was unable to return the call, as he would not have known who had telephoned him. The number withheld issue was confirmed by Ms Young.
12. There is nothing before me to show that the appellant's claim, that even if sent to him he did not receive the notice of hearing, is not true.
13. I therefore find, through no fault of the Judge, that there has been a procedural irregularity sufficient to amount to material error of law denying the appellant the ability to appear at, and be involved in, his asylum appeal.

14. I set the decision of the Judge aside. I follow the practice of the Court of Appeal in that where there has been a procedural irregularity sufficient to amount to unfairness, irrespective of the credibility of any other findings made, the decision must be set aside with no preserved findings. I remit the appeal to the First-tier Tribunal sitting at Bradford to be heard de novo. It is not appropriate for the appeal to be retained within the Upper Tribunal when the fairness issue has deprived the appellant the right to have his appeal considered by the First-tier Tribunal and the fact finding that is required is extensive. Begum considered.
15. The appellant confirmed at the hearing that his address for service in Hull is the same as that contained in the notice of appeal to the First-tier Tribunal although he is also now represented by the solicitors who instructed Miss Patel. It may be advisable for the notice of hearing to be sent to both the appellant directly and to his representatives to avoid a repeat of the situation that developed before the Judge.

Notice of Decision

16. Through no fault of the Judge I find there has been a procedural irregularity sufficient to amount to a material error of law. I set the decision of the First-Tier Tribunal aside. The appeal shall be remitted to the First-Tier Tribunal sitting at Bradford to be heard afresh. There are no preserved findings.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 July 2023/