



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002578
First-tier Tribunal Nos: PA/50415/2022
IA/01182/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

M O A
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Paul Turner, counsel of Imperium Chambers, instructed on a direct access basis

For the Respondent: Mr Susana Cuhna, Home Office Presenting Officer

Heard at Field House on 8 September 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 is a national of Bangladesh born on 1 January 1983. He arrived in the United Kingdom on 4 November 2009 in possession of a Tier 4 Student visa. He subsequently sought and was refused leave outside the Rules, but on appeal he was granted limited leave until 15 March 2014. He then made a subsequent application on the basis of his private and family life in the UK, which was also refused on 29 October 2018.
2. On 8 May 2019, the Appellant claimed asylum. This application was refused on 28 January 2022. An appeal was lodged against that decision by Imperium Chambers on the Appellant's behalf on 7 February 2022.
3. On 16 February 2023, a hearing took place before the First-tier Tribunal. The Judge held as follows at [6]:

"6. The appellants representatives had removed themselves from the record. The appellant did not attend and there was nothing from the appellant to indicate why he had not attended or that he required an adjournment.

7. Having considered Rules 2 and 28 of The Tribunal Procedure Rules 2014 I was satisfied that the appellant had been notified of the hearing and that he had an opportunity to take part in the proceedings and that it was therefore in the interests of justice to proceed with the hearing in the appellant's absence. "

And at [17]:

"17. The appellant did not attend the hearing. The appellants representatives although having removed themselves from the record had previously submitted documents in support of the appellant's appeal which can be found from pages 15 to page 382 of the stitched bundle including a skeleton argument prepared by Paul Turner."

4. In a decision and reasons dated 11 March 2023, the appeal was dismissed. On 30 March 2023 the Appellant contacted his former representatives who told him that they had come off the record and that they had had notification that his appeal had been dismissed. The casenotes on the judicial case management system (which were not available prior to the hearing before the Upper Tribunal) include an email from Mr Hamza Tahir on behalf of Mr Paul Turner to the Legal officers at Taylor House seeking to reinstate the appeal, dated 30 March 2023, which provides, so far as is material, as follows:

"Please be on notice that we are now representing the above-named client in respect of his appeal and would like to give an explanation of the events that have led to the non-attendance of the Appellant. To elucidate, the Appellant initially had an agreement with us to cover the cost of his fees on an instalment basis and this had mostly been kept to until September 2022 at which point the Appellant failed to cover the remaining instalment of his fees.

We had sent the Appellant a number of reminding emails to inform him of the overdue balance however this had been met with no response so we had informed the Appellant that we would no longer be representing him and that we would no longer be sending him updates on his case. We had received the notification of the Appellant's hearing date however as the Appellant had still not covered the remainder of his fees we did not share his hearing date with him.

The Appellant has now called us to request an update and we had informed him that we had taken ourselves off of the case and that we did not attend his hearing as a result of his non-payment. He has notified us that he would like us to start representing him once again and to give an explanation for his non-attendance at the hearing. Crucially, the Appellant seeks to have the hearing re-instated as it is submitted that the case had not been presented effectively in his absence - the judge notes in his decision [7] that he had been satisfied that the Appellant had been aware of the hearing date and that the appeal would be able to proceed pursuant to Rules 2 and 28 of the Tribunal Procedure Rules 2014. The Appellant and his representatives submit that he had not been aware of his hearing date and as a corollary, the decision promulgated 11 March 2023 is not on all fours with the interests of justice.

The fault in the Appellant's non-attendance does not lie entirely with the Appellant and so in the circumstances it is submitted that to preclude the Appellant from carrying on his appeal would contravene the interests of justice. In short, the Appellant and his representatives humbly request the reinstatement of the Appellant's appeal to allow him to be able to present his case in the most effective light." (emphasis added)

5. The response from a legal officer dated 31 March 2023 provides as follows:

"A decision on this appeal was made on 11 March 2023. The hearing took place on 16 February 2023. You took yourselves off the online system on 13 March 2023, after the decision had been promulgated. Please note, the notice of hearing was sent on 08 December 2022, at which time you were still representing the appellant. The decision was uploaded to the online portal and the appeal dismissed. You had access to this decision until 13 March 2023. Should you wish to appeal the decision, you must follow the correct appeal procedure."

6. On 4 April 2023, the Appellant sought advice from his former representatives and an application for permission to appeal to the Upper Tribunal was lodged out of time on 19 April 2023. The grounds in support of the application for permission to appeal asserted that the FTJ had erred in concluding the Appellant had been aware of his hearing date, therefore contravening Rules 2 and 28 of the Tribunal Procedure Rules 2014 and witness statements were adduced from the Appellant, from Messrs Paul Turner, Hamza Tahir and Nick Chuter dated 18 April 2023, attesting to the fact that the Appellant was not aware of the date of his appeal hearing. Alternatively, it was submitted for the same reasons that the decision should be set aside pursuant to rule 32 of the Tribunal Procedure (Upper Tribunal) Rules because the Appellant was not present.

7. The grounds of appeal further assert:

"5 .It is understood and accepted that the FTT decision had been promulgated on 11 March 2023 and so this application is being made 24 days out of time. It is submitted that the fault in the delay lies wholly with the Appellant's representatives and so the Appellant himself should not be penalized.

6.To elucidate, the Appellant had called his representatives on 30 March 2023 regarding his case for an update and had been informed that his representatives had taken themselves off of the case. The Appellant's representatives had been able to access the case via the MyHMCTS system until 13 March 2023 when the dismissal of the case had prompted the reminder for the representatives to take themselves off of the online system. The Appellant had been informed that his case had been decided in his absence and then sought advice on having the appeal decision of 11 March 2023 set aside and applying for permission to appeal. The Appellant came in to seek advice on 04 April 2023.

7. The delay following the 04 April 2023 can wholly be attributed to the Appellant's representatives as the task of taking the attached statements had been assigned to a caseworker that had been on annual leave at the time. It is for this reason that the fault in the delay should not be assigned to the Appellant himself and therefore it would contravene the interests of justice to preclude the Appellant from appealing this matter [in light of the protection-based issues at hand].

8. The witness statement of Mr Paul Turner states that he was instructed to carry out work on the Appellant's behalf with fees paid on an instalment basis; this agreement was mostly kept to but not from September 2022 when the Appellant ceased to pay instalments. Mr Turner accepts that they should have come off the record earlier. Mr Nick Chuter states that he is the senior clerk at Imperium Chambers; that he reached out to seek payment from the Appellant on 29 October 2022; 28 December 2022 and 18 January 2023 and that he instructed Hamza Tahir, the caseworker to cease work on the Appellant's case as he had not made his final payment. Mr Hamza Tahir states that he is the caseworker who was assisting Mr Paul Turner with preparing the Appellant's appeal; that he stopped work on the case in September 2022 because there were outstanding fees that the Appellant needed to pay; that he informed the Appellant of this by telephone and that he did not inform the Appellant about the date of his appeal hearing. Notably, none of the statements state at which date Imperium Chambers removed themselves as representatives from MyHMCTS but it would appear from the grounds of appeal that this was on 13 March 2023, 2 days after the appeal was dismissed, although this does not tally with the information before the First tier Tribunal Judge recorded at [6] on 16 February 2023 that the Appellant's representatives had taken themselves off the record.
9. Permission to appeal was granted by First-tier Tribunal Judge Chowdhury on 12 July 2023 in the following terms:

"(1) The application is out of time but in the circumstances I extend time. The grounds allege the Appellant had not maintained contact or payments with his legal representatives and contacted them on 30 March 2023 regarding his case for an update. The representatives state they had taken themselves off the Tribunal record; the representatives had only been able to access the case via the MyHMCTS system until 13 March 2023 when the dismissal of the case had prompted a reminder for the representatives to take themselves off from the case management system. The Appellant had been informed that his case had been decided in his absence and then sought advice on having the appeal decision of 11 March 2023 set aside and applying for permission to appeal. The Appellant came in to seek advice on 04 April 2023. The representatives state the delay following the 04 April 2023 can wholly be attributed to them. The grounds contend the fault in the delay should not be assigned to the Appellant himself.

(2) As a result of the Appellant not maintaining contact with his representative, and those instructed not informing him of his hearing date the grounds allege that he was unaware of the hearing and thereby deprived of attending and/or legal representation. The grounds are arguable."

Hearing

10. At the hearing before the Upper Tribunal, I sought clarification as to whether physical (or virtual) hearing notices had been sent out in respect of the date of hearing of 16 February 2023. Ms Cuhna confirmed that there was no hearing notice with the date of the appeal hearing on the CCD system. There was also nothing in terms of correspondence between the

Appellant's representatives and the First-tier Tribunal caseworker which indicated that they knew of the hearing date.

11. Mr Turner, acting *pro bono* on behalf of the Appellant, was not aware as to whether or not Imperium Chambers had received notification of the hearing but at my request he contacted his chambers and confirmed that they had received an email in December 2022 which notified them that a hearing date had been booked for 16 February 2023. He accepted that, due to administrative error, a clerk would normally go through the emails and put the information in the diary, this had not taken place, for which he took responsibility. I note, with the benefit of hindsight and access to the judicial case management system, that this is not entirely consistent with Mr Hamza Tahir's email to the legal officers at Taylor House on 30 March 2023 where he appears to state that the firm deliberately did not inform the Appellant of the date of his appeal hearing because he had not paid his fees. If that is indeed the case and Imperium Chambers remained on record as the Appellant's representatives at the time they received notification of the date of his appeal hearing, then this would appear to be at the very least an example of breaches of the BSB's Core Duties CD2 and CD7. However, that is not a matter which is before me. Mr Turner submitted to me that the position remained that the Appellant himself did not receive notification of his hearing date and that neither he nor anyone at Imperium Chambers had informed him of the hearing date either.
12. Ms Cunha submitted that she would have expected the judge dealing with the case to have ensured that the Appellant had been notified that he was required to attend the hearing on the hearing date and that his absence was because he had chosen not to be there. Bearing that in mind, she accepted that there was a material error of law.
13. I indicated in light of Ms Cunha's concession that I found a material error of law in the decision and reasons of the First tier Tribunal Judge; that I would set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal and that my detailed reasons would follow.

Decision and reasons

14. I accept that there is a material error of law in the decision of the First-tier Tribunal Judge at [7] to proceed with the hearing in the absence of the Appellant, without having taken any steps to ensure that the Appellant was in fact on notice of the date of his hearing, given that so far as the Judge was concerned the Appellant was unrepresented and his representatives had apparently come off the record: [6] refers.
15. It is not clear when exactly Mr Turner/Imperium Chambers came off the record as the Appellant's representative: the evidence on the judicial case management system was that he did not in fact come off the record until 2 days after the appeal hearing. However, this is not consistent with the information before the First tier Tribunal Judge that at the time the appeal came before him on 16 February 2023 the Appellant was unrepresented. No physical notice of the appeal hearing appears to have been sent to the Home Office, Imperium Chambers or the Appellant, albeit both Imperium chambers and presumably the Home Office were notified by email of the hearing date and the judicial case manager system shows that a virtual hearing notice with regard to a hearing date on 16 February 2023 was uploaded to the MyHMCTS system on 8 December 2022.

16. The fact remains and the parties were in agreement that the Appellant was unaware of the date of his appeal hearing. The Appellant was present at the hearing before the Upper Tribunal and also made clear in his witness statement supporting the application for permission to appeal to the Upper Tribunal that he intends to prosecute his appeal. Therefore, as a matter of fairness his appeal must be heard afresh before the First tier Tribunal at a hearing where the Appellant has the opportunity to attend and give evidence.
17. This case also raises a wider concern arising from the MyHMCTS system, which is that if, as in this Appellant's case, his representatives remove themselves from the record or, as may have happened, ceased to act on his behalf whilst remaining on the record and failed to act on an email notification providing the date of the appeal hearing, there is no safety net by which an Appellant will be informed by MyHMCTS of the date of the appeal hearing. As a matter of good practice, Appellants must be notified directly to an email or postal address, ideally both, when their appeal is listed for hearing so that they have the opportunity to attend that hearing and pursue their appeal.

Notice of Decision

18. I set the decision aside and remit the appeal for a hearing *de novo* before the First-tier Tribunal.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 October 2023