



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004989

First-Tier Tribunal No: HU/52184/2021
IA/10577/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 7th March 2024**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**EDWIN FABIYANO VISSENSIO
(NO ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant attended in person with the representative who submitted the appeal on his behalf although a dispute in relation to representation had arisen before the hearing.

For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 19 January 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hatton (the Judge), promulgated on 8 August 2022, in which the Judge dismissed his appeal.
2. The appellant is a citizen of Zimbabwe born on the 5 March 1976.
3. The Judge sets out the appellant's immigration history from [2]. It is relevant to note the information recorded by the Judge from [7] which is in the following terms:
 7. The following year, on 16 January 2013, the Appellant made further submissions, which the Respondent refused on 1 February 2013.
 8. Over four years later, the Appellant made further submissions for leave to remain in the UK on 30 May 2017.
 9. Three years and eleven months thereafter, on 27th April 2021, the Respondent refused the Appellant's further submissions.
 10. The Appellant lodged an out of time appeal against the Respondent's decision on 21 May 2021, on human rights grounds.

11. Thereafter, this Tribunal directed the Appellant's legal representatives to provide an explanation, by no later than 28 June 2021, as to why his appeal was lodged out of time. No response was forthcoming. Accordingly, in a decision dated 27 July 2021, this Tribunal refused to extend time to admit the appeal.

12. On 2 August 2021, the Appellant's representatives requested a review of the above decision.

13. Thereafter, in a decision dated 3 August 2021, First-tier Tribunal Judge ("FTJ") Pickering extended the applicable time frame for appealing, and the Appellant's appeal was reinstated.

14. Ten months later, on 14 June 2022 this Tribunal listed the Appellant's substantive appeal hearing to take place on Monday, 1 August 2022, at 2 PM.

15. The following month, on 25 July 2022, this Tribunal listed the Appellant's appeal to be heard on the same date at 10 AM on the express basis that "*The judge will decide on the order in which appeals will be heard, so your case may not be heard until later in the day.*"

16. At 3:22 PM on Tuesday, 26 July 2022, the Appellant's representative sought an adjournment because Counsel was not available at 10 AM on the scheduled hearing date of Monday 1 August 2022. There was no suggestion in the representatives application that Counsel was unavailable at 2 PM on the scheduled hearing date.

17. At 5:23 PM on Thursday, 28 July 2022, a Legal Officer refused the above application, on the basis that the representative had the opportunity to request an afternoon hearing on the scheduled hearing date.

18. At 6:45 PM on Thursday, 28 July 2022, the Appellant's representative made a new adjournment request on the same basis i.e. that Counsel was not available at 10 AM on the scheduled hearing date. As with the preceding application, there was no suggestion in the new application that Counsel was unavailable at 2 PM on the scheduled hearing date. Indeed, the application expressly stated "*I can not (sic) get a barrister t attend at 10am*".

19. I am mindful that in accordance with paragraph 4.1 of the Senior President of Tribunals' Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal dated 13 May 2022, all adjournment applications must be made no later than 4 PM one clear working days before the date of hearing.

20. Plainly, the second adjournment request did not comply with the above requirement. Correspondingly, in accordance with paragraph 4.4, save in exceptional circumstances, any adjournment application made after the period specified in paragraph 4.1 requires the attendance of the party or the representative of the party seeking the adjournment.

21. In my consideration of the second adjournment request, I accepted there were exceptional circumstances, given that the Appellant's representative had made explicit, Counsel's inability to attend the scheduled hearing at 10 AM.

22. Having expressed regard to the above circumstances, at 1:04 PM on Friday, 29 July 2022, I directed as follows:

"Accordingly, in the absence of any indication of Counsel's inability to attend Mondays hearing at 2 PM, I direct that the hearing of this appeal be heard at 2 PM on Monday, 1 August 2022. In accordance with paragraph 4.4 of the above Practice Direction, any application to adjourn the hearing now scheduled to take place at 2 PM on Monday, 1 August 2022 will require the representatives attendance. However, any such application is unlikely to succeed given that no prior indication of Counsel's inability to attend at 2 PM on the scheduled hearing date has previously been notified to this Tribunal."

4. The Judge then records from [23], as a preliminary issue, that notwithstanding the direction of 29th July 2022 neither the Appellant, his wife, nor his legal representative attended the hearing.
5. The Judge finds failure to attend striking given his clerk had notified him that the Appellant attending the hearing centre on the morning of 1 August 2022. The Judge finds this is a clear indication that the Appellant was aware that the hearing had been listed [24]. The Judge also records being advised by his clerk and from the Tribunal's Administrative Officer that the Appellant's legal representatives

were reminded on the morning of 1 August 2022 that they are required to attend the appeal hearing that had been scheduled to start at 2 PM [25].

6. The Judge notes that at 1:45 PM the Appellant's legal representatives make an adjournment application via the online case management system in which they claimed they had received no notification on Friday afternoon that the adjournment was granted and that no mention of the hearing be moved back to 2 PM had been provided. The Judge rejected this argument referring at [28] to the email notification sent to the representatives at 1:04 PM on Friday 29th July 2022 making any reference to the appeal hearing having been adjourned.
7. The Judge finds no valid reasons for the representative's failure to attend the scheduled hearing noting, in particular, that having had sight of the email train between the Tribunal and the Appellant's representative it was clear that Council had been booked to attend the hearing at 2 PM Monday, 1 August 2022 [33].
8. The Judge also finds there is nothing preventing the Appellant from being at the hearing centre for his appeal and that the decision not to stay for the scheduled hearing was without valid justification [36].
9. The Judge concluded in all the circumstances it was appropriate to proceed in the absence of the appellant or his representatives.
10. The Judge went on to consider the evidence that was available from [44] leading to it being concluded that the Appellant could not satisfy the requirements of Appendix FM of the Immigration Rules [96], could not satisfy the requirements of paragraph GEN.3.2 of Appendix FM [101], and that the decision is proportionate particularly as on the evidence before the Judge the appellant's marriage could continue without hindrance overseas [117].
11. The appellant sought permission to appeal arguing that the hearing was unfair, which was refused by another judge of the First-tier Tribunal.
12. The application was renewed to the Upper Tribunal and granted by Upper Tribunal Judge Blundell on 20 November 2023, the operative part of the grant being in the following terms:
 1. It is arguable that the hearing before the First-tier Tribunal was vitiated by procedural unfairness. At present, however, the facts are far from clear to me.
 2. It is evidently the case that the matter was finally listed to be heard at 2 PM on 1 August 2022 but the circumstances in which the appellant did not appear before the judge are not clear. There is an email from him dated 3 October 2022 in which he suggests that he went to the hearing centre and was told that the case had been adjourned. There is now a letter from him dated 27 March 2023, however, which states that his solicitors told him nothing and that he did not know that he 'had an appeal interview on... 1/08/2022'. I am satisfied that the circumstances before they FtT require further consideration that the appellant did not attend the hearing for reasons beyond his control.
 3. I note that the appellant is not currently represented by the same solicitor. He appears to be and represented. It is important that he understands that the Upper Tribunal will not accept unquestioningly that his former solicitor acted without his instructions or otherwise acted inappropriately. In the event that he is to submit, for example, that she failed to tell him about the hearing or that it had been adjourned, he is required to put her on notice of that allegation and seek her comments: BT (former solicitors' alleged misconduct) Nepal [2004] UKIAT 311.

Decision and analysis

13. The Judge at [22] sets out details of the direction he gave which should, if it was communicated to the parties in such terms, have enabled the hearing to proceed.
14. It appears from the evidence and documents I have seen that what was communicated to the parties at 1:04 PM on 29th July 2022 was only "your application has been granted. The respondent has been notified of this decision."

15. The application was to adjourn the hearing listed for 10 AM due to non-availability of Counsel.
16. Whatever the Judge may have anticipated it does not appear the full text of his direction was communicated to the appellant or the appellant's representatives. The actual communication sent on 29th July 2022 also possibly explains the fact that when the appellant turned up at court on the morning of the hearing he was told by a member of the Tribunal staff that the matter had been adjourned as a result of which he left the Hearing Centre to await developments.
17. Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 reads:

Hearing in a party's absence

28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
 - (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
 - (b) considers that it is in the interests of justice to proceed with the hearing.
18. It appears that, through no fault of the Judge, Rule 28 (a) was not satisfied as notwithstanding the Judge's direction there does not appear to have been proper notification of the details and revised relisting of the hearing.
19. Whilst the Judges reference to a member of the Tribunal staff telephoning the representatives on the morning and reminding them to come to the hearing listed for 2 PM, which suggests reasonable steps have been taken to notify the parties of the hearing, that resulted in a further request for an adjournment which was refused. The Judge's finding that Counsel was available appears to be a mistake of fact.
20. Whilst the determination considers whether Rule 28 (a) was met, there does not appear to have been adequate consideration of whether Rule 28(b) was met. In light of the information now to hand it is quite clear that the interests of justice were not met with the Judge proceeding to hear the merits of the appeal in the absence of the appellant.
21. I find the Judge has erred in law on the basis of a procedural irregularity sufficient to amount to a material error of law. I set the decision of the Judge aside.
22. In accordance with the guidance provided by the Court of Appeal there can be no preserved findings in light of the lack of a fair hearing.
23. As the appellant has been denied a fair hearing before the First-tier Tribunal and as there is still a requirement for extensive fact finding in relation to the outstanding issues in this appeal, and having considered the guidance provided by the Upper Tribunal in Begum and the appropriate Practice Direction, I find it is appropriate in all the circumstances for the appeal to be remitted to the First-tier Tribunal sitting at Bradford to be heard afresh by a judge other than Judge Hatton.

Notice of Decision

24. The First-tier Tribunal materially erred in law. I set that decision aside. The appeal shall be remitted to the First-tier tribunal sitting at Bradford to be heard *de novo* by a judge other than Judge Hatton.

C J Hanson

Appeal Number: UI- 2022-004989

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 January 2024