Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20770/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 27 August 2014	**On 27 August 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

VLADIMIR ROMERO RODRIGUEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C McGinley, of Gray & Co., Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1. By application dated 17 February 2013 the appellant, a Cuban, sought further leave to remain in the UK as a spouse. To question 8.2 on the form, "Are you a national of a majority English-speaking country?" he incorrectly answered, "Yes".

He did not provide evidence that he met the English language requirement in the rules.

2. By letter and notice dated 13 May 2013 the respondent refused the application for failure to meet that requirement, and directed removal to Cuba.

3. The appellant filed notice of appeal to the First-tier Tribunal on 31 May 2013. His grounds, prepared by legal representatives, assert that he did not know about the English language test certificate requirement, introduced after his first grant of leave; that the respondent should have given him the chance to produce further evidence; and that the decision would breach article 8 rights of the appellant, his wife, and family.

4. On 20 August 2013 the First-tier Tribunal issued notice of hearing on 20 March 2014. On that date, the appellant attended and was granted an adjournment due to the absence of his wife, who would have been a witness but was in hospital, and to withdrawal of his representatives.

5. On 24 March 2014 the First-tier Tribunal issued by first class post notice of hearing on 7 April 2014. The case came before First-tier Tribunal Judge Wallace on that date. In her determination promulgated on 17 April 2014 she explains at ¶13 that she appellant did not appear and had provided no explanation, so she proceeded in his absence. She also records at ¶19 that she was told after the hearing that the appellant had contacted the tribunal administration (presumably by telephone) to say that he received the notice of hearing only on the morning of the hearing. She went on to dismiss the appeal.

6. (The appellant lives in Fort William, too far from the hearing centre for him to attend on the same day as he received the notice, even if his post arrived early.)

7. The grounds of appeal to the Upper Tribunal are that the First-tier Tribunal erred by failing to adjourn the hearing; by wrongly referring to "the entry clearance decision"; by failing to exercise discretion over the language requirement; and by failing to consider whether the case might succeed outside the rules, under article 8.

8. Having heard helpful submissions from both representatives, I indicated that the appeal would be allowed.

9. The appellant had advised Mr McGinley that he works as a night porter in a hotel. He received the notice of hearing on return from work, and telephoned the tribunal right away.

10. It is plain that the appellant had shown every sign of pursuing his case, and although the postal delay is surprisingly long, the explanation seems more likely than not. There may have been procedural unfairness. However, I was

persuaded that the appeal to the First-tier Tribunal should have succeeded on other grounds, so the point is not crucial.

11. The grounds of appeal to the First-tier Tribunal were poorly prepared, and not of as much help to the judge.

12. The judge's reference to "the entry clearance decision" is careless. It might not on its own be significant, but it is the clue to why the judge went wrong about the admissibility and relevance of evidence that the appellant obtained an English language test certificate after the respondent made her decision, but prior to the hearing in the First-tier Tribunal.

13. This was not an entry clearance case, nor one governed by restrictions on evidence under s.85A of the 2002 Act. It fell under s. 85(4), which enables the tribunal to "… consider evidence about any matter which it thinks relevant to the substance of the decision, including one which concerns a matter arising after the date of the decision." *LS* (Post-decision evidence, Direction, Appealability) [2005] UKAIT 85 explained this at ¶9:

> … s 85 draws a clear line between refusals of entry clearance and certificate of entitlement and all other cases. Only in the former two types of case does the "clock stop" so that evidence of circumstances appertaining after the date of the decision cannot be taken into account. In all other cases the Adjudicator is under no such restriction, and it follows that if an appellant claims that the decision "is not in accordance with immigration rules", he is entitled to adduce evidence as to the present position, even if it is clear (or, as in the present appeal, conceded) that the requirements of the Immigration Rules were not met at the date of the decision itself.

14. The grounds of appeal to the Upper Tribunal do not say what the source of the judge's "discretion" might be. However, although not specific on the point of admissibility and relevance of evidence, they are sufficient to accommodate it. Once the correct statutory provision is pointed out, the case is simple. The appellant put matters right by producing the certificate.

15. There was never any viable case based on Article 8 ECHR outside the Immigration Rules, but that is not a live issue.

16. The determination of the First-tier Tribunal is **set aside** and the appeal, as originally brought to the First-tier Tribunal, is **allowed** under the Immigration Rules.

Hugh Macleman

27 August 2014
Judge of the Upper Tribunal