Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19562/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 9th September 2014	**On 3rd October 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AWET TECLE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Cole of Parker Rhodes Hickmotts
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge McGinty made following a hearing at Manchester on 28th May 2014.

Background

2. The Appellant is a citizen of Eritrea, resident in Khartoum, born on 1st January 1996. He applied for entry clearance to join his father in the UK for settlement under paragraph 297 of the Immigration Rules but, on 24th September 2013, was refused on the grounds that the Respondent was not satisfied that the Appellant was seeking leave to enter the UK to join a parent who had had sole responsibility for him or that he was seeking to join a parent who was present and settled in the UK and that there were serious and compelling family or other considerations which made exclusion of the child undesirable and suitable arrangement have been made for his care. Furthermore it was not shown that the Appellant could be maintained without recourse to public funds.

3. The judge recorded that the appeal had been listed to start at 10 o'clock but, by 12.15pm, there was no appearance by the Appellant or his representatives, who had been served with notice and accordingly he proceeded to hear the appeal in their absence.

4. He relied on the previous decision of Judge Nicholson made following a hearing on 15th January 2013 and noted that Judge Nicholson had had serious concerns regarding the inconsistencies in the Sponsor's evidence. He did not accept either that the Appellant and Sponsor were in contact to the extent claimed nor did he accept the Sponsor's account of the Appellant's living conditions in Khartoum. Furthermore he was not satisfied that the Appellant could be maintained adequately in the UK.

The Grounds of Application

5. The Appellant sought permission to appeal on the grounds that neither he nor his representatives had received the notice of hearing. He accepted that notice of hearing was sent to Sheffield Law Centre but relied on an email from the supervising solicitor there which confirms that the Law Centre did not receive any notification of the hearing.

6. The Sponsor was also served with notice but it was returned marked "not known at this address" although in fact the Sponsor was living there. There was therefore a good reason for the Sponsor's and his representatives' absence albeit unknown to the judge.

7. It was open to the judge to ask the Tribunal staff to make enquiries of the representatives or the Sponsor as telephone numbers were available for both of them but he did not do so. He relied on the decisions in FP (Iran) v SSHD [2007] EWCA Civ 13 and MM (unfairness; E & R) Sudan [2014] UKUT 00105 and asked that the appeal be remitted to the First-tier for another hearing on the grounds that the Appellant had been deprived of his right to a fair hearing as a consequence of the judge's decision to hear the appeal in the absence of either him or his representative.

8. Permission to appeal was granted by Judge Davidge for the reasons stated in the grounds on 29th July 2014.

Submissions

9. Mr Cole relied on his grounds and told me that his instructions from Sheffield Law Centre were that they simply did not receive the notice of hearing. Sheffield Law Centre were at that time in the process of handing their cases over to Parker Rhodes Hickmotts and were generally very efficient at dealing with all the correspondence. He had no explanation as to why the notice of hearing for the Sponsor was returned because he was still living at that address at that time.

10. Mrs Pettersen submitted that the judge was properly satisfied as to service of the hearing notice and was fully entitled to proceed to deal with the appeal in the absence of the Sponsor.

Findings and Conclusions

11. Under Rule 19(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 the Tribunal may hear an appeal in the absence of a party or his representative if satisfied that –

> "(a) the party or his representative has been given notice of the date, time and place of the hearing, and
>
> (b) there is no good reason for such absence."

12. Clearly on the information before the judge there was no satisfactory explanation at all for the absence of both the Sponsor and his representative. He checked whether notice had been properly served and having satisfied himself that it had been, was entitled to proceed as he did.

13. In FP (Iran) the Court of Appeal stated:

> "Put another way, Rule 19(1) simply assumes that a person can never have a good reason for not knowing about a notice served in accordance with the Rules. So far as he is concerned, however, the opportunity to provide an explanation for his absence is simply unrealistic.
>
> In these circumstances, in my judgment, Rule 19(1) enters the realm of removing the right of the party to provide a satisfactory explanation for his absence, by providing that the Tribunal must proceed in his absence if he does not provide a satisfactory explanation in cases where he did not know that he had to put forward such an explanation. A situation in which a party is given a right and then it is taken away before he has a chance to exercise it is not one, in my judgment, which is fair, nor in my judgment is it one which fulfils the basic requirements of the rule of law."

14. And again:

> "Paragraph (b) is unqualified, and an explanation could plainly include an explanation that the party did not become aware of the notice of hearing. If a party is to have the right to put forward this explanation, and to show that, in the particular circumstances, this was a satisfactory explanation, it is not enough for the Rule to rely on the notice of hearing as notice of his opportunity to put forward an acceptable explanation."

15. The problem here is that there has still not been a satisfactory explanation for the Sponsor's absence nor that of his representatives. So far as the Sponsor is concerned it is not disputed that the notice was sent to the correct address. Indeed it clearly was having been returned to the Tribunals Service with a note:

> "Not at this address. Please return to the sender."

16. There is absolutely no explanation as to why the notice of hearing should have been returned in this manner. It could be that someone is unlawfully interfering with his post, or, equally that the Sponsor at that time decided that he did not wish to pursue the appeal.

17. Mr Cole made the point that the judge could have asked the court clerk to telephone the representatives or indeed the Sponsor himself. That is correct but there is no obligation on the judge or the court staff to do so and indeed it may be an impracticable imposition on the administrative staff.

18. So far as Sheffield Law Centre is concerned it is clear that at that time they had handed their files over to Parker Rhodes Hickmotts. However, Mr Cole said that the handover took place in January, and this notice was sent in mid-February. Mr Cole said that in general Sheffield Law Centre had been very efficient in sending correspondence on. They did have systems in place for dealing with notices of hearing on cases which had been handed over.

19. The Appellant's difficulties are compounded by the fact that HM Courts & Tribunals Service sent a fax coversheet on 22nd May 2014 to Sheffield Law Centre stating that the bundle of documents was awaited and requiring them to serve the bundle as a matter of urgency. Sheffield Law Centre were informed that a Tigrinya interpreter had been booked for the hearing.

20. In summary, no satisfactory explanation has ever been given for the fact that the Sponsor and his representatives were informed of the notice of hearing both by post and by subsequent fax five days before the hearing. The transfer of files might have been an explanation for missing the notice of hearing, or not properly recording it but the transfer took place a month before the notice was sent and Sheffield Law Centre had a system in place for dealing with correspondence. In any event it is no explanation at all for

the failure of Sheffield Law Centre to respond to the fax which was sent some five days before the hearing.

21. In these circumstances I cannot see that it could properly be said that there is any error of law in this determination.

Decision

22. The original judge did not err in law and his decision shall stand.

Signed Date

Upper Tribunal Judge Taylor