



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/01976/2016

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2018

Decision & Reasons Promulgated
On 06 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

CHANDRA BAHADUR G C
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Lourdes of Counsel

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Norris promulgated on 2 February 2018 dismissing the Appellant's appeal against a decision of the Respondent dated 14 April 2016 refusing leave to remain in the United Kingdom.
2. The Appellant is a national of Nepal born on 26 September 1981. I do not propose to rehearse his immigration history which is a matter of record set out in the Respondent's 'reasons for refusal' letter ('RFRL') of 14 April 2016, and is also summarised in the opening paragraphs of the Decision of the First-tier Tribunal. I will refer to the history as is incidental for the purposes of this appeal.

3. The proceedings before the First-tier Tribunal have a history of adjournments: see further below. The matter was in due course listed before Judge Norris on 19 January 2018. The Appellant did not attend. A note was received from him which suggested that he felt unable to attend and had gone to an Accident and Emergency Department and was waiting to be seen by a doctor. The Judge proceeded with the appeal notwithstanding this communication: I return to the Judge's reasons for so doing below. After the hearing, and before the Judge had promulgated the Decision, further communication was received from the Appellant providing additional information as to the circumstances of his attendance at what is described as an Urgent Care Centre on the day of the hearing. The Judge appropriately considered such materials to decide whether it was still appropriate to determine the appeal without the Appellant having had the benefit of giving live evidence; the Judge maintained the decision that refusing to adjourn and proceeding in the absence of the Appellant was appropriate. The Judge, having considered all of the available evidence - which necessarily did not include any oral evidence from the Appellant - then dismissed the appeal for the reasons set out in the Decision.
4. The Appellant sought permission to appeal which was in the first instance refused by First-tier Tribunal Judge Grimmett on 5 March 2018. However permission to appeal was granted by Upper Tribunal Judge King on 16 May 2018. Judge King considered that it was arguable that the Judge had fallen into error in refusing the application for an adjournment and proceeding with the appeal in the Appellant's absence.
5. The history of the various adjournment applications that had previously been made in this appeal, and the First-tier Tribunal Judge's reasons for refusing an adjournment and proceeding with the appeal in the Appellant's absence, are conveniently set out at paragraphs 5.1 - 5.11 of the Decision of the First-tier Tribunal.

“5.1 In April 2016 when the Appellant submitted his appeal, he requested a paper hearing. On receipt of the Notice of Hearing, he changed his decision and requested an oral hearing. This was originally listed for 23 November 2017. On 17 November 2017, the Appellant faxed the Tribunal seeking a postponement. He claimed to be suffering from “bad flu and fever” and “severe chest pains”. He said his GP had advised him to rest and he was to have a blood test on 23 November; a house mate was suffering with tuberculosis and the Appellant was undergoing “further investigation”. He said he was unable to travel long distances and did not want to circulate the virus. I note that the Appellant lives in Hounslow, which is perhaps between two and three miles from the Tribunal centre.

5.2 With the Appellant's letter was a letter “To Whom it May Concern” from a Dr Singh of a practice in Hounslow West. It says that the Appellant has been registered there for some five years; he is pre-diabetic, has high cholesterol and suffers from anxiety and depression, for which he has been prescribed medication and misses his wife and two children who are in Nepal. He had had a cough “for a few weeks” for which he had been given antibiotics, and was undergoing further investigation for tuberculosis. Dr Singh had advised him not to attend “classes and work” during the investigation period.

- 5.3 *The Tribunal initially refused the adjournment on the basis that the Appellant would not be required to work on 23 November, and advised him of the same. However, he renewed the adjournment application on 22 November, on the basis he was having a blood test the following day and had been referred by his GP for an ECG; and this time the adjournment was granted. On this occasion, he had submitted a further report from Dr Singh, who said that his chest X-ray had been normal. However, the Appellant was complaining of chest pain, feeling unwell and feeling dizzy, and had been referred for an ECG. He was not well enough to attend Court, said Dr Singh.*
- 5.4 *On 29 December 2017, a new Notice of Hearing was sent out, listing the matter for 19 January 2018. On 12 January, the Tribunal received a new application to adjourn. This time, the Appellant said that he was suffering from "bad flu" and that he was having a confirmatory chest X-ray. He referred again to his housemate's tuberculosis and said he had been given a mask to wear. He was also having pain and swelling in "the right feet". He said he was "having trouble to walk". A letter from Dr Singh also referred to "pain and swelling in the right feet" [sic] and said it was not possible for the Appellant to attend the hearing while he was waiting for further investigation "which could take a few weeks".*
- 5.5 *This application to adjourn was refused because it was noted that the doctor had given no date when the Appellant would be fit to attend; it was vague as to why he could not sit in a courtroom and the matter could not be adjourned indefinitely.*
- 5.6 *On 15 January the Appellant wrote again, saying that he was awaiting a further assessment that could take three to six weeks and he could not walk or stand for a long time due to the sickness. Dr Singh, again referring to "pain and swelling in the right feet", said the Appellant had been referred to Physiotherapy for an assessment of his pain, and in light of this, it would not be possible for him to attend the hearing on 19 January. However, the adjournment was refused once more on the basis that the Appellant would not be required to walk or stand for a long time and the appeal could not be delayed any longer.*
- 5.7 *On 19 January the Appellant did not attend the hearing. Instead, I received from the court usher a handwritten note saying that the appellant could not attend because of "unberable pain in my leg" [sic]. He stated "This morning, I fell down on the ground while I wake up. I couldn't sleep whole the night due to the pain". He said he was at the A and E department of the hospital, waiting to be seen by the doctor. He said he could not control the pain, which "aggravates" even when he even stands up on his feet. By a separate letter he said that his friend was passing on the letter to the Court.*
- 5.8 *I considered the application to adjourn, bearing in mind that the test for an adjournment is one of fairness only. The duty of fairness does not of itself indicate that any application for an adjournment however unmeritorious must always be granted. What has to be considered are a range of factors but especially whether as a result of a refusal of the adjournment the Appellant would be deprived of a fair hearing.*

5.9 *I concluded that it would be in the interests of justice and in keeping with the overriding objective to proceed. This was because:*

- *The Appellant had submitted a bundle and a witness statement, the latter also containing paragraphs which is in my view amounted to submissions. His statement would not be subject to cross examination as a result of him not attending the hearing; that would potentially be more advantageous to him.*
- *There was no supporting evidence before me that any medical condition from which the Appellant was suffering would have prevented him from travelling up to three miles and sitting in the tribunal during a brief hearing. He had apparently managed to travel to the hospital.*
- *His letter was internally inconsistent because it said on one hand he had been unable to sleep all night and on the other that he had fallen over when he woke up.*
- *I was concerned that Dr Singh and the Appellant both referred to “right feet” in the plural and would have liked an explanation for that.*
- *If I adjourned the hearing, it would not have been relisted until around August or September.*

Therefore, we proceeded in his absence in accordance with Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

5.10 *I reserved my judgment. Before I had promulgated this determination, I received a fax sent by from the Appellant, dated 19 January. He stated “Please do not find enclosed my Vitual fracture which I had on my leg as I had to visit the hospital due to the terrible pain I was suffering from the last few days” [sic]. One enclosure was a slip from the Hounslow and Richmond Community Healthcare NHS Trust, signed by “UCC Reception”, confirming that the Appellant had “attended the Urgent Care Centre on 19 January 2018”. The second was a patient information leaflet saying that the Appellant has a telephone appointment with the Virtual Fracture Clinic on 22 January 2018. The third was a photograph of what appears to be someone’s leg in supportive boot. The last enclosure appeared to be two taxi receipts. One was dated 19 January, showing a pick up at Hinton Avenue, where the Appellant lives, going to “West H Hospital”. The other was a pick up from what appears to say Middlesex Hospital, destination Hinton Avenue. This was undated. Neither the receipts nor the receptionist’s confirmation show the times of the journeys/visit.*

5.11 *I considered whether to set aside the hearing and re-list it so that the Appellant could attend in person. I concluded that I should not. I did not have any evidence of the reason why the Appellant had chosen to visit the hospital on the day of the hearing if he had been in pain for a “few days”. I did not understand why he had not gone to the clinic earlier, or indeed back to his GP for pain relief, and then he would have been able to attend the hearing. I did have evidence that he had managed to take a taxi to and from the hospital. I noted that Rule 2(2)(a) of the 2014 Tribunal Procedure Rules*

provides that dealing with a case fairly and justly includes avoiding delay so far as it compatible with proper consideration of the issues. I considered that the Appellant had been given the opportunity to participate fully in the proceedings (in accordance with 2(2)(c), because he had already submitted a statement (to which I return below) and a bundle, and those had been taken into account. I did not consider that it would be in keeping with the overriding objective to set the proceedings aside and re-list the case for many months hence. Therefore, my decision below stands."

6. By way of further background it is to be noted that the materials filed after the hearing but before promulgation of the Decision appear to include a diagnosis that the Appellant had suffered a stress fracture on his third metatarsal. The materials before the Judge at the time of the hearing to the effect that the Appellant was at A&E unable to bear weight on his leg, are supported by the subsequent materials which confirm a fractured third metatarsal, remedial treatment by way of a supportive boot, and referral to a virtual fracture clinic.
7. In such circumstances I pause to observe that whilst the question of whether or not in such circumstances the Appellant was genuinely unable to attend the hearing, and/or the extent to which he voluntarily elected to attend to his injury on the day of the hearing in preference to attending the hearing, may be nuanced matters of contention, the evidence does not, however, suggest the Appellant may readily be dismissed as a mere malingerer.
8. In granting permission to appeal Judge King identified the first bullet point at paragraph 5.9 as being particularly problematic.
9. In my judgment the First-tier Tribunal Judge did indeed fall into error in offering as a reason for proceeding in the Appellant's absence that "*His statement would not be subject to cross-examination as a result of him not attending the hearing, that would potentially be more advantageous to him*".
10. It seems to me that it is not possible before hearing a witness to evaluate whether being subject to cross-examination is more or less advantageous to his or her case. The purpose of cross-examination is to test evidence. The testing of evidence might well in certain cases undermine that evidence. In other cases the testing of evidence may strengthen that evidence. The suggestion that it might potentially be to a particular appellant's benefit not to be cross-examined carries with it a hint of pre-judgment; inherent in the suggestion that it is potentially advantageous to have evidence remain untested is a doubt as to the robustness of that evidence. The point of having a hearing is to allow testimony to be heard, and, as necessary and appropriate, tested: to suggest as the Judge seems to do, that it might be to the Appellant's advantage not to have a hearing because he would not be subject to cross-examination, not only carries an element of prejudice as to the strength of his testimony, but has here operated to deny him an opportunity of fortifying his written testimony. In my judgement this aspect of the Judge's reasoning is quite simply wrong.
11. Notwithstanding that the Judge has offered other reasons for refusing to adjourn the case, the magnitude of the error identified is such that I am not satisfied that due and

proper consideration has been given to the issue of the adjournment. I am satisfied that the Judge fell into material error in evaluating whether or not it was appropriate to proceed in the absence of the Appellant.

12. I have taken into account Mr Melvin's submission that the Judge had had due and proper regard to the overriding objective and had reached a sustainable conclusion. Mr Melvin also pointed to the unfortunate history of earlier adjournments, and the prospect referred to by the Judge of not being able to relist the hearing again for a period of some seven or eight months.
13. I note and emphasise the terms of the 'overriding objective'. Paragraph 2(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 states "*The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly*". It may thus be seen that the primary provision articulating the overriding objective indicates that at its core is the imperative to deal with matters fairly. Whilst the matters subsequently non-exhaustively listed at paragraph 2(2)(a)-(e) as illustrative of what 'dealing with a case fairly and justly' might entail include "*avoiding delay*" (paragraph 2(2)(e)) - which was plainly a matter pertinent herein given the history of previous adjournments - it is to be noted that the avoidance of delay is qualified by the phrase "*so far as compatible with proper consideration of the issues*". Paragraph 2(2)(e) is in any event to be read as subject to the requirements of 'fairness' and 'justness'. The desirability of avoiding delay must also be balanced against "*ensuring, so far as practicable, that the parties are able to participate fully in the proceedings*" (paragraph 2(2)(c)).
14. I am not persuaded that the Judge's approach was compatible with proper consideration of the issues, or ensured so far as practicable that the Appellant was able to participate fully in the proceedings. As such I reject Mr Melvin's submission that the decision gave due and proper effect to the overriding objective.
15. Judge King in granting permission to appeal observed that "*it may be in practice the detail given by the Appellant is unlikely to prevail against the weight of evidence from the Respondent*". I recognise and acknowledge the potential difficulty in his case, particularly bearing in mind that the materials he has filed so far do not engage directly with important aspects of the allegation made against him in respect of having made use of a proxy tester in order to secure a TOEIC certificate. Nor does the Appellant's evidence yet appear to address the issue of the proportionality of interference with his private life if he were to be expected to leave the United Kingdom in order to seek to make a further application as a student. In this latter context it is to be noted that the Appellant's application was for a period of leave outside the Immigration Rules because he had been unable to find a suitable course as a basis for making an application for leave to remain as a student.
16. However, it is axiomatic that an appellant is entitled to a fair hearing irrespective of the merits of his case. I am not prepared to take the view that the merits of the Appellant's case are so lacking that he is in some way to forego the opportunity of having a hearing of his appeal.

17. In all the circumstances I find that the refusal to adjourn is vitiated as being founded on unsustainable reasoning. The Decision of the First-tier Tribunal therefore requires to be set aside; necessarily, the decision in the appeal is now to be remade by way of a new hearing before the First-tier Tribunal with all issues at large.
18. I do not consider it necessary to make any particular Directions. It is incumbent upon the Appellant, perhaps with the assistance of his advisors, to decide what if any further materials ought to be filed. If he does wish to provide any further evidence then he should do so in accordance with the standard directions timetable which will be issued alongside the new Notice of Hearing that will be sent to the Appellant in due course.

Notice of Decision

19. The decision of the First-tier Tribunal contained a material error of law and is set aside.
20. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Norris, with all issues at large.
21. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **30 July 2018**

Deputy Upper Tribunal Judge I A Lewis