IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004726

First-tier Tribunal No: HU/54111/2023
LH/02273/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 January 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RAMI ARAGAW LAKEW
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Hussian instructed by Gracefields Solicitors, (via Microsoft Teams).
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 5 January 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Saffer ('the Judge'), promulgated following a hearing at Bradford on 2 August 2023, in which the Judge dismissed her appeal.
2. The appellant is an Ethiopian national who was born on 7 October 1975. On 30 November 2022 she applied for leave to enter the UK to join her children who are both British citizens. Her daughter, Katrina, was born on 26 June 2001 and her son Matthias on 19 July 2004.
3. The Judge records the Presenting Officer, following concessions, outlining the remaining issues as being:

   (a) whether exceptional circumstances or unjustifiably harsh consequences exist by not granting entry clearance,
   (b) whether there are compassionate factors as Katrina and Matthias are adults and can apply for benefits to ensure that essential living needs are met,

(c) whether the appellant's ability to provide emotional support via remote means and visits are sufficient to meet Katrina and Matthias' needs, and
(d) whether the emotional ties that exist go beyond those normally existing between adults.

4. The Judge summarises the appellant's case between [7 – 14] before setting out his findings from [15], which can be summarised as follows:

a) That it is accepted the appellant's husband died in 2017, that she lives with her family in Addis Ababa, that she sent Katrina and Matthias to the UK for a better education and standard of living. The appellant works for and is supported by the Church, that the appellant and Katerina and Matthias have "roughly daily" WhatsApp calls which are at times the subject of internet issues, Katrina and Matthias are both studying and live together in a flat, and that Katrina works [15].
b) Whilst accepting the circumstances referred to are usual, the Judge did not accept they are exceptional [15].
c) There is a requirement for a fee to be submitted with an application. The respondent decided not to charge a fee. The application was then submitted, not on 12 July 2022, but on 30 November 2022 [16].
d) The respondent's guidance on Fee Waivers Version 6 (8 April 2022) states that "*Fee waivers can only be granted to in-country applications".* As this is not an in country application the respondent can only have granted the application using her discretion which must be based on something, the Judge states that in his judgement the starting point must be the guidance that does exist [21].
e) It was not reasonable, even considering Matthias's best interests, to have expected the respondent to make a decision on the fee waiver application in the extremely brief period prior to his 18th birthday. It was submitted so late the only expectation could have been that it will have been considered after Mattias had turned 18. There is no evidence that a request for expedition was made. It could not reasonably be argued that in the seven day period the appellant will be unable to meet her essential living needs, was destitute, or is at imminent risk of destitution, as she was at all times living with family, the situation appertaining at the date of the hearing. The only basis for granting the fee waiver was that the appellant could not afford the fee which was not found to be a basis for expedition of the fee waiver application [22].
f) It was not established that the Fee Waiver application is the date the consideration of the visa application as opposed to the date of the application for a visa itself was submitted [23].
g) The applicant does not meet the requirements of E-ECPT.2.2 as Matthias was not under 18 at the date of application [24].
h) It is not found the time taken to grant the fee waiver was excessive or had any impact on the issues in the appeal. It took less than four months in circumstances where there was no guidance, and it makes no difference whether Matthias was 18 years and one day or 18 years and four months old when the decision was taken [25].
i) It was not accepted that exceptional circumstances or unjustifiably harsh consequences exist by not granting entry clearance as Katrina and Matthias are adults and can work over the summer and part time during term and apply for benefits to ensure their essential living needs are met. There was no up-to-date independent professional evidence of any significant problems for either of them. When the fee waiver application was made and at the date of the hearing both were studying, and Katrina was working. The adverse impact on their education was not significant as Katrina is still successfully studying and

will shortly enter the second year of her degree. Matthias is also studying. The appellant can continue to provide emotional support via remote means and their visits. The Judge accepts the current costs of tickets is prohibitive given their income although in the future Katrina will graduate and there is no discernible reason she will not get a job that will enable the tickets to be affordable [26].

j) Katrina is 22, Matthias is 19. Their only living parent is the applicant. The Judge accepts their relationship with her goes beyond those normally existing between adults. Family life living in different countries was created when it was decided Katrina and Matthias should come to the UK in 2018 when Katrina was 17 and Matthias was 14. It is open to either to return to Ethiopia to be with their mother at any time. It was decided they would not. The respondent's decision merely meant maintains the existing family life [27].

k) The nature of the family life consists of their ability to visit the appellant and contact via modern means of communication. The decision under challenge does not interfere with that. It has not been established that consequences of gravity exist even given the low threshold as there is no cogent up-to-date evidence of any significant problems for any of them [28].

l) There is a legitimate aim in retaining the integrity of immigration control where the rules are not met [28].

m) In the alternative, had proportionality been reached, which the Judge finds it is not, there is a duty to promote family life. The Judge finds there is no reason Katrina and Matthias cannot go to Ethiopia to pursue their family life with the appellant when balancing the positive factors on her side of the equation, namely the natural desire to be together, as against the negative factors identified of not meeting the rules. The Judge concludes the respondent's decision is proportionate to the identified legitimate aim in retaining the integrity of immigration control where the rules are not met [29].

5. The appellant sought permission to appeal. The first ground asserts an error by the Judge at [21] in relation to the question of whether fee waivers could be granted in respect of an entry clearance application. The grounds refer to other guidance published by the Home Office specifically issued for entry clearance applications to which the Judge makes no reference. It is entitled "Affordability fee waiver: Overseas Human Rights-based applications (Article 8) Version 1.0" dated 16 June 2022 ,which the grounds state applies for clearance applicant such as the appellant, they could be granted fee waiver for their applications, and that fee waiver was granted to the appellant because her application fell within the category specifically mentioned in the guidance, not necessarily by way of discretion as the Judge erroneously stated.

6. The grounds also assert that in an entry clearance application, where an applicant meets the eligibility requirements for the application at the date of submission of the fee waiver application, the substantive application submitted following the grant of the fee waiver is also treated as having been submitted at the date the fee waiver application was submitted.

7. The grounds also assert that following the grant of a fee waiver for an in country application, and similarly, following the grant of a fee waiver for an entry clearance application, the applicant is also given 28 days within which to submit the substantive application. The grounds assert the essence of granting the 28 days to submit the substantive application is to preserve the applicant's situation as at the date of the submission of the fee waiver application. The grounds assert that as the appellant met the eligibility relationship requirement at the date of the fee waiver application it was submitted, in that her son was under 18, that situation will have been preserved for 28 days, and she should still be considered

to meet that requirement provided she submits the substantive application within 28 days. The grounds assert the Judges finding that fee waivers could only be granted in respect of in country applications is a material error of law which significantly affected the Judge's decision.

8. The grounds also refer to the fee waiver decision of 7 November 2022 still referring to the appellant as a parent of a child under 18 which it is argued is clear recognition of the fact that the application was to be submitted by the appellant as a parent of a child under 18 which was the situation being preserved for 28 days to enable the appellant to submit the application. The grounds assert had this not been the respondent's intention the fee waiver decision would not have referred to the appellant as the parent of a child under 18, which was the position when the fee waiver request was submitted. The Grounds assert the Judge ignoring this fact which is a material error of law.

9. Permission to appeal was granted by another judge of the First-tier Tribunal on 27 October 2023, the operative part of the grant being in the following terms:

> 2. The appellant is a citizen of Ethiopia who sought entry clearance under the parent route of Appendix FM of the immigration rules, in order to join her two British children in the UK.
>
> 3. The younger child, her son, was a week shy of his 18th birthday when the appellant made an application for a fee waiver on 12/07/2022. The fee waiver was granted by the respondent on 07/11/2022, whereupon the appellant made the entry clearance application on the 30/11/2022. When refused by the ECO, it was noted that both children were over 18 at the date of the application, and said that the appellant could not therefore benefit from the parent route.
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> 4. On appeal the appellant contended that the date of the fee waiver application should have been treated as the date of application, and as such the son would have been under the age of 18, and the parent route rules could be relied upon. Judge Saffer disagreed and, considering the matter solely 'outside of the rules, has dismissed the appeal.
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> 5. The appellant now seeks permission to appeal arguing, amongst other things, that the Judge has erred in law through misunderstanding the respondent's guidance on fee waivers. I find it to be just arguable that the date of the request for a fee waiver should have been treated as the date of application, such that the parent route rules ought to have been looked at by the Judge. I also consider that this is a matter in relation to which guidance from the Upper Tribunal would be beneficial.
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> 6. Permission to appeal is therefore granted.

10. The application is opposed by the Secretary of State in a Rule 24 response dated 10 November 2023, the operative part of which reads:

> 2. The appeal is opposed.
>
> 3. The respondent submits that the grounds of appeal is resisted, and no error of law has been identified.
>
> 4. The permission to grant by IJ Mills, the appellant argues that the date of the fee waiver application should have been treated as the date of entry clearance application. First Tier Judge Staffer (the Judge) erred on this point by following the in-country fee wanier guidance and failing to consider the Affordability fee waiver: overseas Human Rights-based applications (Article 8).
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> 5. The Judge relied on the case of Kaur (Entry clearance – date of application) [2013] UKUT 00381 (IAC) at [4] and [16]. On the correct approach that the application

should be accompanied by the correct fee. The respondent submits there is no disclosable error.

6. The Judge further noted at [17] 'I am fortified in that view as the letter in support of the Fee Waiver application states' "We are aware that this is not the application for a visa...the grant of this application would be very significant as it would enable the substantive application to be submitted."

7. At [18] the Judge noted that 'the Fee Waiver confirmation (7 November 2022) makes no mention of the Fee Waiver application date being the date the visa application is considered as having been made'.

8. The Appellant argues that [21] erred by reference by the respondent's incountry fee waiver guidance. This may have been an error, but it was not sole consideration as demonstrated in the above paragraphs. Therefore, any error in this paragraph is immaterial to the overall decision.

9. The appellant argues in their GOA that 'Respondent's decision dated 07 November 2022 granting the fee waiver application. The decision maker still referred to the appellant as a parent of a child under 18. We submit that this was a clear recognition of the fact that the application was to be submitted by the appellant as a parent of a child under 18. This was the situation which was being preserved for 28 days.'

10. The respondent submits that the reading the guidance1 at page 24 granting a fee waiver "If an applicant is granted a fee waiver, they will be issued with a token to be used when applying for Entry Clearance online. This application should be submitted within 28 calendar days of the actual date of the fee waiver decision and followed by the submission of biometrics at a Visa Application Centre (VAC). Failure to do this could result in the token no longer being valid and a new fee waiver application may be required." The suggestion that 28 days preserves a situation as described at [10 above] is a not correct upon reading the guidance as relied upon by the appellant.

11. The respondent requests an oral hearing.

11. In a skeleton argument dated 29 December 2023 the appellant's representatives identifies the key issues for determination by the Upper Tribunal as being:

a) Whether the FtT was right in holding that fee waivers can only be granted in in-country applications, and not in entry clearance applications;
b) Whether the FtT was right in ignoring the date of the submission of the fee waiver application by the appellant;
c) Whether the FtT was right in holding that the appellant's son (Matthias) was not under the age of 18 years at the date of the application, and therefore did not meet the eligibility relationship requirement of Appendix FM EECPT.2.2.

Discussion and analysis

12. Even if the Judge made an error of fact in referring to the guidance applicable to in-country applications, without making reference to the guidance applicable to entry clearance cases concerning fee waiver application, I do not find this to be a material factor.
13. The core finding of the Judge is that set out at [16] in which it is written:

16. It is clear from Kaur that the fee must be submitted with the application. The Respondent decided not to charge a fee. The application was then submitted. It was not submitted on 12 July 2022 but on 30 November 2022.

14. The Judge was entitled to come to this conclusion for two reasons, firstly, as that is the stated date of application online application form which specifically states: "DATE OF APPLICATION:30 November 2022 18:58 Greenwich Mean Time (GMT)", and secondly because the application could not be submitted until after the fee waiver application had been determined.

15. Although not referred to specifically by either party, a further publication relevant to this issue is the guidance on 'Validation, variation, voiding and withdrawal of applications, version 9.0, updated 15 November 2023' which provides guidance for decision makers considering applications for entry clearance, permission to enter and stay and settlement, and describes how to decide whether an application is valid, and what to do if it is not.

16. In relation to the requirement concerning fee payment and Immigration Health Surcharge it is written:

Fee payment

Each applicant must pay any relevant fee for their application in full and in accordance with the application process. 'Fee' includes the application fee and any required Immigration Health Surcharge (IHS) payment.

The fee to be paid is the one that applies on the date of application (for information on how to calculate the date of application see: Date of application: original application). For a variation application, the fee to be paid is the one that applies on the date of the variation application, not the date of the original application. If the fee changes after the date of application and whilst an application is being considered, this does not make the application invalid. The fees can be found on GOV.UK.

If an applicant did not apply for a fee waiver and has not paid the correct fee, you must write to the applicant using the 'Validity reminder in and out of country' template to tell them that their application will be rejected as invalid if they do not pay the fee within 10 working days. The template will tell the applicant that if they cannot pay the fee, they may have the option to vary their application by submitting a fee waiver application and then a further application for permission without a fee if that fee waiver is successful. If the applicant does not pay the fee following the reminder, then you must record the reason for rejection on the validity screen in Atlas/in CID notes in CID.

Immigration Health Surcharge

The Immigration Health Surcharge (IHS) was introduced on 6 April 2015. All applications which require payment of the IHS, including applications to vary submitted on or after this date, must include payment of the IHS unless the applicant is exempt from payment or has obtained a fee waiver for the IHS. The IHS does not apply to applications for settlement.

If an applicant applies for entry clearance which will take effect as limited permission for more than 6 months, or permission to stay for a limited period, they are required to pay the IHS as part of their application (unless exempt). They must do so in accordance with the process set out in Pay for UK healthcare as part of your immigration application.

The IHS must be refunded if an application for entry clearance or permission to stay is:

- refused
- rejected
- withdrawn prior to a decision being made
- void

Discretion - Fee waiver or fee exemption and validation

Some applicants can apply for a fee waiver to cover the application fee and/or the IHS. Some applications can benefit from a partial fee waiver, for example, when a family unit is making an application together and one applicant has been granted a fee waiver.

The most common fee waiver is for particular human rights-based applications and some citizenship applications.

An applicant applying online must apply for and obtain a fee waiver before they submit their application. An applicant applying on a paper form, where fee waiver is available, can apply for a fee waiver at the same time.

For guidance on fee waivers see: Applications for a fee waiver. For guidance on IHS waivers see: Pay for UK healthcare as part of your immigration application.

If the application for a fee waiver is on a human rights based route or the person raises a human rights claim in the fee waiver application (see the Appeal rights guidance for guidance on what is a human rights claim) and the fee waiver request is rejected by the Home Office as they do not meet the requirements set out in the guidance, you must still record the human rights claim on Atlas / CID, as the claim must be decided before a removal takes place.

17. The underlining above (other than on the links highlighted in blue) is my emphasis. The application made by the appellant was an online application. The guidance clearly shows that an applicant applying online must apply for and obtained a fee waiver before they submit their application. This is clear confirmation that the process envisaged is as found by the Judge. That is in accordance with the guidance and general principles that the required fee must be paid for an application to be valid. The fee waiver is effectively an acceptance by the entry clearance officer or Secretary of State that a person cannot afford the fee required for valid application and therefore the application will be considered without this requirement having been fulfilled. Therefore, until the fee waiver application is granted the validity of the application on the basis of non-payment of the fee cannot be determined.

18. Mr Hussain submitted this creates a two tier scheme and is unfair, but I do not find such a claim has any merit as:

a). There is no legal requirement to make a decision or to have process that an individual applicant must consider to be fair to them.

b) The comparison between the routs for a person who has funds to make application and a person who requires exemption of fees is misleading as they relate to two different classes of applicants.

c) I was referred to no evidence the fee exemption process/procedure, including the need to await a decision on an application before submitting the substantive application, has been found to be unlawful or stuck down.

d) No discrimination is made out as the rules of the scheme apply to all applicants seeking fees exemption.

e) I have been referred to no authority that establishes the Secretary of State does not have the power to devise a scheme that enables a person to make an application in the manner set out in the guidance, or to specify the procedure to be followed by a person who is granted a fee exemption in relation to the timing any application being made once the application has been decided. It was not made out the application in this case was not considered in a reasonable time frame as found by the Judge.

f) I have been referred to no authority in support of the claim by the appellant that the 28 day grace period following a grant of fee waiver in which to

make a substantive claim, in an out of country application, has the effect of enabling the date of the substantive application to be read back as being the date of fees exemption application. The respondent's policy and guidance specifically state otherwise. They are two completely different applications, one relating to fees and the other to the substantive claim. The purpose of the 28 day period is create a period in which the fee exception is valid during which an application can be made. In an in-country application it is the shorter 10 day period.

19. In his submission in support of the claim that the date of application for the substantive application for leave should be taken as the date of the application for the fee exemption, Mr Hussain sought to rely upon [12] and [16] of the skeleton argument dated 29 December 2023.
20. Paragraph [12] reads:

> 12. In applications involving fee waivers, the usual practice of the Respondent is to treat the date of the submission of the fee waiver request as the date of the immigration application. This situation is confirmed by the respondent's statements on their website Fee Waiver (Visa – immigration.service.gov.uk).

21. I was not referred to anything to support the argument that there is a policy or practice in force supporting the appellant's arguments, especially in light of the stated position in the Rule 24 response to the contrary.
22. The document referred to is the guidance on the Visa and Immigration website entitled "Requesting a fee waiver". The second paragraph of the document specifically states: *"You must make this fee waiver request before making your immigration or nationality application. You may start your immigration or nationality application online, but it should only be submitted after you have received a decision on your fee waiver request*."
23. There is a material difference between starting an online application, which enables an individual to complete the necessary parts of the visa application form and save the same until it can be submitted for consideration, and actually submitting the application.
24. The under the heading "Applications for entry clearance" it is stated that if an applicant is granted a fee waiver they must apply for entry clearance for one of the above stated reasons. It is quite clear from all the published material that an application of the nature of that under consideration in this appeal, where an individual has applied for a fee waiver, even if the online application is completed, it cannot be submitted until after the decision has been made on the fee waiver application.
25. That must be correct as a valid application requires the payment of a fee. The fee waiver request is a request to the Secretary of State that the requirement for a fee is waived, i.e. no fee is required. It is only when such a decision is made that a valid application can be made without the required fee. Otherwise there is a risk of an individual having their application declared invalid as a result of the required fee not being included.
26. The claim the appellant's argument is supported by [12] of the skeleton argument is without arguable merit.
27. Paragraph [16] of the skeleton argument reads:

> 16 The Respondent reached a decision on the fee waiver application on 07/11/2022. In granting the fee waiver request, the respondent gave the appellant 28 days from the date of the grant of fee waiver within which to submit her visa application. The fee waiver decision maker knew that the appellant's child had already turned 18 years before the date of the decision. We submit that the fee waiver decision make

> gave the appellant 28 days within which to submit her visa application in order to enable the appellant to complete the second stage of her visa application. This was in recognition of the fact that the child on whom the application was based was under 18 years when the fee waiver request was submitted. It was this fact or situation that the fee waiver decision preserved for 28 days, which implied that the fee waiver decision maker accepted that the application met the eligibility relationship requirement.

28. This claim is totally without merit and is an attempt to materially distort the reality of the situation to fit the appellant's circumstances. The 28 day period is granted to an out of country applicant once a decision to grant the fee waiver request has been made. It is the period during which the grant of the fee waiver will remain valid. It is not in recognition of any factual position that may have existed at any time. It cannot be implied that the fee waiver decision-maker accepted anything in relation to the proposed application for leave, as the fee waiver decision-maker would not have had the necessary information or authority to conduct such an assessment at that point in time.
29. The fact the decision on the fee waiver may have referred to the application being made in relation to a child under 18 does not support the appellant's claim at all. That is the basis of the information provided to the decision-maker not an immigration decision in relation to the merits of the claim. That is particularly relevant as the respondent stated policy is that the proposed applicant had 28 days from the grant of the fee waiver in which to make the application.
30. What is being suggested as being different regimes in relation to different applications does not assist the appellant. They are but because the application, i.e. fee waiver and substantive, are different.
31. The fee waiver was granted on 7 November 2022. The application was submitted on 30 November 2022.
32. Although it was raised with Mr Hussain that the issue was not any fault with the practice or procedure but the fact the application for the fee waiver was submitted so late in the day, no satisfactory explanation was provided. This was specifically noted by the Judge. The appellant instructed Gracefield's Solicitors. It is not known when such instructions were given or by whom. It is not known whether the application for the fee exemption was made promptly upon receipt of such instructions or whether there was any delay or in action in relation to such instructions. That is not a matter for this tribunal. As the Judge notes, there was no request for expedition of the fee waiver request.
33. I do not find the appellant has established legal error material in the Judge dismissing the appeal for the reasons stated. I cannot find any merit in the argument that the mechanism for obtaining a fee exemption is unlawfully or unreasonably creates a two tier system, such that it could be challenged on basis of perversity or illegality. These are not judicial review proceedings in any event.
34. A person who has money is able to go into a shop to buy a box of tea bags. A person has no money and requires a credit card or other forms of finance to make such a purchase has to make an application and wait for that application to be decided. If it is in their favour they can then use that facility to buy the box of tea bags. Similarly a person has money can instruct a solicitor or a barrister to represent them in legal proceedings. A person without funds who requires legal aid must apply for legal aid and cannot instruct a solicitors or barristers until such application has been granted. These are examples of similar "two tier systems" which reflect the reality of the situation.
35. In reply to the three specific issues identified by the appellant the answers are as follows

a) Whether the FtT was right in holding that fee waivers can only be granted in in-country applications, and not in entry clearance applications;

No, but that error of fact is not material.

b) Whether the FtT was right in ignoring the date of the submission of the fee waiver application by the appellant;

The Judge did not ignore the date of submission of the fee waiver application. The finding that is not the correct date for the substantive application, as found by the Judge, has not been shown to be a finding not reasonable open to the Judge on the evidence.

c) Whether the FtT was right in holding that the appellant's son (Matthias) was not under the age of 18 years at the date of the application, and therefore did not meet the eligibility relationship requirement of Appendix FM E ECPT.2.2.

Yes, as that was the correct assessment of his age at the correct date of application when considering Mathias' date of birth.

36. A second issue that arose in relation to the procedure on the day, which is not relevant to the findings set out above, is the failure of Mr Hussain to be ready to start the appeal promptly when it was called on.

37. It is accepted that permission was given to Mr Hussain to appear remotely. That is not the issue. Mr Hussain provides medical evidence in support of his request. Reasonable adjustment is made to enable him to appear via Microsoft Teams. That was the request he made in an email dated the 3 January 2024.

38. In the same email Mr Hussain wrote "*Could I also request that the UTJ is asked if I could be put to the end of the list as I potentially have another matter in the Court of Protection via teams which is listed at 10 AM for 1 hr. I am instructed on the UT matter pro bono and would therefore be very grateful if the court could accommodate my request if possible*".

39. Permission was not given nor communicated to Mr Hussain that his request for the appeal to be put to the back of the list was granted. Indeed, in light of the request, the Tribunal clerk was advised the Upper Tribunal was willing and able to start its list early and asked to make contact with Mr Hussain, which she did, to ascertain whether he was in a position to start at 9:40 AM.

40. The Tribunal Clerk was advised by Mr Hussain that he was not ready to start early. It also transpired he did not have a case before the Court of Protection that he needed to deal with but claimed he would not in fact be ready to come before the Upper Tribunal until 10:15 AM.

41. The Upper Tribunal had two other matters in its list. One of these had been disposed of by agreement the day before requiring only a written determination to be promulgated in due course. The second appeal, a challenge by the Secretary of State, was opposed a very good Rule 24 reply drafted by Ms Mair, also of Garden Court North. This meant the Upper Tribunal was able to dispose of the remaining cases in the list very quickly.

42. The Tribunal Clerk therefore telephoned Mr Hussain at around 10:15 to enquire whether he was ready to start his case. It was a reasonable assumption that he was in light of his earlier statements. He indicated, however, that he was not and in fact would not be in a position to attend until 10:30. No satisfactory explanation was provided. During one telephone call the impression formed by the Tribunal Clerk was that Mr Hussain may have been in a car.

43. Whilst it is understandable that there may be circumstances in which an advocate is unable to start their list earlier or at the allocated time, such circumstances should be the exception rather than the norm.
44. There have been problems in the past with representatives taking on too many cases and causing unacceptable delay within a list. Such practice should not be allowed to occur.
45. The current version of the Bar Standards Board Handbook (BSB Handbook) came into force on 20 September 2023. Part 2 sets out the Code of Conduct which includes the Core Duties expected of a barrister. CD 1 states that a barrister must observe their duty to the court in the administration of justice. CD1 overrides any other core duty. The reference to a court also includes a Tribunal.
46. An advocate's duty to the court includes a requirement that they must take reasonable steps to avoid wasting the court's time.
47. If an advocate is told their case is listed for a particular time it is reasonable to expect that they will be ready. If not, a satisfactory explanation must be provided. It is not unheard of for cases to go short or at times not to even be able to start for a variety of reasons.
48. If the reason Mr Hussain was not ready to start was as a result of domestic arrangements, such as taking a family member somewhere or something similar, that is not acceptable. Whilst the tribunal day runs from 10 AM to 4 PM, and on this occasion the Tribunal waited until he had returned and was available to logon, that situation should not have arisen.
49. It is accepted Mr Hussain offered profuse apologies, but it is hoped this is a situation that will not occur in the future, as otherwise requests to attend remotely, especially if it is suspected that such an arrangement is being abused, may be declined in cases listed on a face-to-face basis, with a requirement for the attendance of Mr Hussain or another legal representative if he is unable to do so.

Notice of Decision

50. No legal error material to the decision of the Judge to dismiss the appeal is made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 January 2024