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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40374/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 July 2015	**On 13 October 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

WASEEM ABBAS
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Garrod, counsel, instructed by Pride Solicitors.
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before us for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge P J Clarke ("the FTTJ") promulgated on 14 January 2015, in which he dismissed the Appellant's appeal against the refusal of leave to remain in the UK as a Tier 4 (General) Student Migrant.

2. No anonymity direction was made by the FTTJ and we see no need for such a direction in these proceedings.

Background

3. The Appellant's application for leave to remain was refused under paragraph 245ZX(o) of the Immigration Rules on the grounds that the Appellant had not demonstrated that he genuinely intended to study on the course he claimed to want to follow.

4. The Appellant issued a notice of appeal and the matter duly came before FTTJ Clarke on 8 January 2015. Neither the Appellant nor his representative attended the hearing which proceeded in his absence. The FTTJ failed to take into account that the Appellant's solicitors had applied, by fax sent to the Tribunal on 5 January 2015, for an adjournment on the grounds of the Appellant's ill health. The FTTJ decided that, the notice of hearing having been properly served and there being no request for an adjournment or indication that the position would be any different on any other occasion, it was in the interests of justice to proceed with the hearing, in accordance with Rule 28 of the *Tribunal Procedure (First-tier Tribunal (Immigration and Asylum) Rules 2014.*

5. Mr Garrod's principal submission is that the Appellant failed to have a fair hearing, the FTTJ having failed to take into account the Appellant's application. Had the FTTJ done so, he would have appreciated the medical evidence indicated the Appellant was too ill to attend the hearing and to give oral evidence. As it was, the Appellant had lost the opportunity to give oral evidence to the effect that he was a genuine student, the sole reason for refusal of his application. Furthermore, the fact the Judge had seen the complete interview record whereas the Appellant had not, prejudiced the Appellant: he should have been examined on it. Mr Garrod accepted that no witness statement or bundle had been provided by the Appellant for the hearing. He submitted that the Judge had made findings which were not accurate and which might not have been made had the Appellant given oral evidence. It would, for example, have assisted the Judge if the Appellant had clarified the timescales pertaining to his study and the revocation of his College's sponsorship licence; whereas the Judge had found the Appellant had been away from formal study "for a period of (about) 2 years", the Appellant's evidence was that it was nearer 18 months. As Mr Garrod put it to us "the Judge may have come to the same conclusions on the evidence, but he may not". He submitted that it was "likely he wouldn't have come to the same conclusion"; he would have taken into account what the Appellant was doing, including getting his English language qualification. He submitted that the FTTJ had failed to take into account the Respondent's 60 day policy and where the Home Office's responsibility on that issue lay. Mr Garrod accepted that he was in some difficulty with arguing an error of law in relation to the Appellant's Article 8 rights, stating that the case law had been "fluid" at the date of decision. He conceded that if the Appellant's appeal under the

Immigration Rules had failed, it would have been unlikely to succeed on human rights grounds.

6. For the Respondent, Mr Avery submitted that, even if the FTTJ had considered the application and medical evidence in support, it would have made no difference because the nature of the Appellant's condition was not such as to warrant an adjournment. There was no indication the Appellant's medical condition would have prevented the Appellant's attendance at the hearing or his ability to give oral evidence. He submitted that no reasonable Judge, seeing the application and evidence, would have adjourned. There was insufficient evidence to demonstrate a good reason for adjournment; in particular no diagnosis had been provided.

7. Insofar as the materiality of any potential error of law was concerned, Mr Avery submitted that the Appellant had not been disadvantaged because s85A(3) Nationality, Immigration and Asylum Act 2002 limited the evidence to be considered by the FTTJ in appeals against the refusal of leave under the points based scheme in the Immigration Rules. Furthermore, the Appellant had had the opportunity to address the issues identified in the reasons for refusal letter prior to the hearing taking place yet had not lodged a witness statement or a bundle of documents for the hearing. The Appellant was, he said, "angling … for another hearing". Mr Avery noted the FTTJ had taken into account the extensive grounds of appeal lodged by the Appellant. If the Appellant had had an issue with the lack of a complete transcript of the interview, he should have raised it prior to the hearing before the FTTJ, rather than at the Upper Tribunal hearing; to challenge the matter at this late stage was not, he said, "a realistic approach".

8. In response, Mr Garrod noted that s85A had been repealed. He referred to **Ahmed and Another (PBS: admissible evidence) [2014] UKUT 00365 (IAC)** as a possible source of guidance albeit he noted some differences in the circumstances of that case. He also invited us to disregard the Respondent's submission that s85A prohibited reliance by the Appellant on oral evidence in a points based appeal: it was common practice, he submitted, for oral evidence to be admitted in points based appeals and the Respondent had herself relied on post-application evidence. Mr Garrod submitted that it had been incumbent on the FTTJ to ensure the Appellant had had a copy of the interview record; he should have "kept matters under observation". He submitted that an adjournment "may have been appropriate"; the Appellant had wanted to be present and he should have been given the opportunity to adduce evidence in support of his appeal.

Discussion

9. We are satisfied that the Appellant's application for an adjournment, together with the medical evidence in support, had been faxed to the Tribunal in advance of the hearing and that it was either on the file and

missed by the Judge or had not yet reached the file. In either case, it was an error of procedure for the application to be overlooked and not considered or a decision taken on it. We therefore turn to the issue of materiality.

10. The power to adjourn the hearing was in Rule 4(3)(h) of *The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014*. Also relevant is Rule 2 which sets out the overriding objective and the parties' obligation to co-operate with the Tribunal, as follows:

> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
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> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
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> (d) using any special expertise of the Tribunal effectively; and
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> (e) avoiding delay, so far as compatible with proper consideration of the issues.
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> (3) The Tribunal must seek to give effect to the overriding objective when it—
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> (a) exercises any power under these Rules; or
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> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

11. The Court of Appeal in **Ex parte Martin [1994] Imm AR 172** set out guidelines on the various matters which should be taken into account when a judicial body is asked to adjourn proceedings. These include: (i) The importance of the proceedings and their likely consequences to the party seeking the adjournment; (ii) the risk of the party being prejudiced in the conduct to the proceedings if the application were refused; (iii) the risk of prejudice or other disadvantage to the other party if the adjournment were granted; (iv) the convenience of the court; (v) the interests of justice generally and the efficient despatch of Court business; (vi) the desirability of not delaying future litigants by adjourning early and thus leaving the court empty; and (vii) the extent to which the party applying for the adjournment has been responsible for creating the difficulty which has led to the application.

12. In **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** it was held that, if a Tribunal refuses to accede to an adjournment request, such a decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. That said, the principal issue is whether the refusal of an adjournment deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? Also relevant is the guidance in **SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284**.

13. We have been referred by Mr Avery, for the Respondent, to the application of s85A. In that regard, Mr Garrod referred us to **Ahmed and Another (PBS: admissible evidence) [2014] UKUT 365 (IAC**) although he accepted it may not be wholly relevant. The Tribunal said in that case at paragraph 5 that the purpose of s85A Exception 2 "is quite clear. It is that where a Points Based application is made and refused, the assessment by the Judge is to be of the material that was before the decision-maker rather than a new consideration of new material. In other words the appeal if it is successful is on the basis that the decision-maker with the material before him should have made a different decision, not on the basis that a different way of presenting the application would have produced a different decision". Section 85A restricts the ability of an applicant to adduce new material; it does not restrict the ability of the Respondent to adduce post-application evidence, such as that obtained in interview. We do not consider that **Ahmed** assists either party because it does not address the ability of an appellant to adduce oral evidence at a hearing on a points based appeal.

14. The Appellant was aware the hearing was to take place on the date listed. He took a risk, in our view, in failing to instruct his solicitors to attend to make the application orally to the judge, in circumstances where no response had been received in response to the written application faxed 3 days before the hearing. The medical evidence he produced in support of his application referred to difficulties standing and sitting as a result of his back condition; whilst it may be implicit that he could not travel to the hearing centre, this was not specifically stated. More importantly, the medical evidence did not suggest he was incapable of giving oral evidence at the hearing, drafting a witness statement or giving instructions to his solicitors. Nor was there any indication in the solicitors' application or the medical evidence as to when the Appellant would be able to attend a hearing in the future. We also note that the medical evidence predated the hearing date by about a week; it was not therefore contemporaneous. No explanation was given by the Appellant's solicitors for the failure to file a witness statement and bundle of documents in readiness for the appeal. Nor was an application made for an extension of time to do so. For these

reasons, we consider that, had the Judge been aware of the application and medical evidence, he would have refused the application, particularly as the content of the Appellant's bundle was likely to have been limited to those documents submitted in support of his application and these were available from the Respondent's bundle in any event. The FTTJ would also have considered it relevant that the Appellant had provided detailed grounds of appeal which resembled a witness statement (albeit without a statement of truth) setting out his case and specific responses to the reasons for refusal. We also consider the Judge would have been particularly concerned that there was no indication as to when the Appellant would be able to attend an adjourned hearing. We find therefore that he would, bearing in mind the overriding objective, have considered it was in the interests of justice to proceed with the hearing in the Appellant's absence.

15. We have also taken into account that the FTTJ was provided, at the hearing by the Respondent's representative, with a complete copy of the interview record, whereas the Appellant had not been provided with one. It should have been apparent to the Appellant and his solicitors that their copy was incomplete and yet neither they, nor indeed Mr Garrod, had noted prior to the hearing before us that their copies were incomplete. We also note that the Respondent had identified in her reasons for refusal the specific questions and answers in interview on which she relied in support of her decision and the Appellant commented on those matters in his detailed grounds of appeal. Thus the FTTJ had before him the Appellant's evidence, albeit in the form of his grounds of appeal, on the issues which had formed the basis of the refusal. If the Appellant and/or his representatives had attended the hearing before the FTTJ, they would have been provided by the Respondent (as was the FTTJ) with a full copy of the interview record and could have sought an adjournment to enable them to consider it (if that was required). The fact that neither the Appellant nor those representing him, had noticed, until being alerted to it at the hearing before us, that the record was incomplete suggests to us that the lack of a complete record was not material to the issues before the FTTJ.

16. Mr Garrod's submission is that, because the Appellant had not seen the full interview record, the Appellant was prejudiced and should have been examined on it. However, we do not consider examination of the Appellant on the content of the interview record would have assisted the FTTJ or altered the outcome, particularly as Mr Garrod conceded that the complete interview record was largely accurate. We are satisfied, on this basis, that it is not a contentious document.

17. We do not consider s85A impacts on the issues before us: the Judge had the benefit of detailed grounds of appeal which were fact specific and tailored to the appeal. Whilst not in the form of a signed statement or containing a statement of truth, the FTTJ treated them as such. He sets out the content of the grounds in paragraph 15 and states at paragraph 17 that he assumes (in the Appellant's favour) that they are the basis of the

Appellant's claim. It is evident that the FTTJ bore the detailed grounds in mind when making his decision. It is not clear to us how examination of the Appellant would have impacted on the outcome. The FTTJ put particular store by the Appellant's admission that he had been "away from formal study for a period of (about) 2 years". Whilst it was submitted by Mr Garrod that this period was nearer 18 months, it remains the case that the Appellant had been away from formal study for a prolonged period and that home study is not relevant for the purpose of a Tier 4 application. Whether or not that period was about two years or was 18 months is immaterial: both are significant periods of absence from formal study.

18. Whilst Mr Garrod submitted that some of the FTTJ's findings were inaccurate, they were based on the grounds of appeal before him and are therefore sustainable.

19. We note the FTTJ's finding that "A genuine student … would have made far greater efforts to obtain a new College, and would have informed the Home Office of his situation". Mr Garrod submitted that, had the Appellant been examined, he would have provided an explanation for failing to be in contact with the Home Office. However, the FTTJ took into account the Appellant's explanation in his grounds of appeal, namely that his previous college had told him he had to wait for a Home Office letter; the FTTJ found this lacked credibility and his finding is sustainable given the content of the grounds of appeal.

20. If any disadvantage arose as a result of the lack of oral evidence, it was possibly to the Respondent who did not have the opportunity to cross-examine the Appellant at the hearing on the content of his grounds of appeal which the FTTJ effectively treated as a witness statement.

21. We are satisfied the FTTJ took account of all material considerations and we are satisfied that the Appellant did not lose his right to a fair hearing as a result of the FTTJ's procedural error in overlooking the application for an adjournment.

Decision

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of procedure but it was not material to the outcome.

23. We do not set aside the decision.

24. We dismiss the appeal.

Signed Dated 12 October 2015

Deputy Upper Tribunal Judge A M Black

Fee Award

There can be no fee award.

Signed Dated 12 October 2015.

Deputy Upper Tribunal Judge A M Black