



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00008/2017

THE IMMIGRATION ACTS

Heard at Field House

On 29 November 2018

**Decision &
Promulgated**

On 21 November 2018

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR FARHAD RONI SARKER
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hyder (Counsel) instructed by Westbrook Law

For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on 12 January 1992. On 17 October 2012 he applied for leave to remain in the UK as a Tier 1 Entrepreneur. This application was refused and his appeal against that decision was allowed on the basis that the Respondent's decision was not in accordance with the law.
2. The appeal was remitted back to the Respondent for reconsideration and on 13 December 2016 the Respondent again refused the application but for different reasons. The Appellant appealed against this decision and his

appeal came before Judge of the First-tier Tribunal Pears for hearing on 28 June 2018. In a decision and reasons promulgated on 4 July 2018, the judge dismissed the appeal finding that there was an absence of material evidence and that it would not be unduly harsh to expect the Appellant to leave the UK nor would it be disproportionate.

3. Permission to appeal was sought in time on a number of bases, but in particular that the Appellant was unwell and was in hospital on the morning of the hearing so was unable to attend. A medical note and photographs of the Appellant in hospital were provided through his legal representative at the hearing and an application for an adjournment was made on the basis that neither of the core issues in the appeal could be dealt with fairly or justly without the presence of the Appellant. However, the judge proceeded to refuse the adjournment request and went on to determine the appeal. It was submitted that the judge erred materially in law in so doing.
4. Permission to appeal was granted by First-tier Tribunal Judge Birrell in a decision dated 3 October 2018 on the basis that: *“it is arguable that faced with evidence of his admission to hospital on the morning of the hearing it was not open to the judge to find that there was “insufficient evidence that he was unable to attend the hearing”*.

Hearing

5. In light of the allegation of procedural fairness and given the absence of a Rule 24 response on the Tribunal file, I asked Ms Pal whether she intended to oppose the appeal. Ms Pal stated that she had not received any of the evidence as to whether the Appellant was in hospital. This was copied for her, that evidence being a note from Croydon University Hospital and three photographs showing the Appellant in a hospital bed. Ms Pal submitted that the judge had considered whether there should be an adjournment at [2] and [3] of the decision and reasons and found that there was insufficient evidence to show why he had not attended the hearing.
6. Having regard to the Procedure Rules, the judge found the matter could go ahead without the Appellant being in attendance at the hearing and Ms Pal submitted that the issue was whether the Appellant had provided evidence from financial institutions such as Halifax and Barclays. The Appellant sought to explain this in a statement which the Judge sets out at [12] and [13] of the decision. She submitted that given the issue was, amongst other things, missing documents, this would not have remedied the situation and thus the refusal of the adjournment did not prejudice the Appellant in any way as documents were clearly missing. Even if the Appellant had been in attendance, he would not have been able to assist the judge in this respect.
7. Ms Pal submitted the other issue was the ETS point. The judge declined to accept the Respondent’s evidence in this respect because it was served on

the morning and because the Appellant was not there. She submitted that if the Appellant had been in attendance the evidence would not have been excluded and so there would have been no difference to the outcome of the appeal.

8. In his submissions, Mr Hyder sought to rely on the grounds of appeal. He disagreed that the issue of missing bank statements could be decided without the Appellant being present and the benefit of his oral evidence. Mr Hyder submitted that the TOEIC issue clearly required the Appellant's evidence as credibility was in issue. The evidence served by the Respondent at the date of the hearing and rejected due to its lateness was also generic, as it was an Excel spreadsheet and statement.
9. He submitted that the judge's finding would depend on cross-examination of the Appellant to assess his credibility and if the Appellant was not there it was not possible for this to happen. Whilst the Appellant may not have succeeded and the appeal may not have been decided in his favour, clearly the matter had to be decided through hearing oral evidence from him. Mr Hyder submitted there was no dispute as to the Appellant being in hospital and made reference to evidence post dating the hearing, that I declined to accept as part of the assessment of whether or not the judge had erred materially in law.
10. Mr Hyder submitted that in relation to the issue of bank documents, it should be noted that the Appellant's business partner's appeal had succeeded, which was heard on the same day by a different judge. However the Appellant and his business partner have fallen out and he was not privy to his appeal reference number. Mr Hyder submitted, in respect of the evidence from the bank, that the Appellant was not the account holder but relied instead on third party investors. However he sought to rely on the judgment in *Nawaz* at [50] which dealt with that exact issue.
11. Consequently it was necessary to hear evidence from the Appellant in order for him to have the opportunity to give evidence about his attempts with the third party Sponsor to obtain documentary evidence in support of his appeal. Mr Hyder sought to rely on E2 of the Respondent's bundle and the fact that third party declarations had been made and included in the application but not included in the Respondent's bundle.
12. In summary, Mr Hyder submitted on these core issues it was not possible for the judge to make a decision fairly and justly in the absence of the Appellant and that a short adjournment would not in any event have prejudiced either party.
13. I reserved my decision, which I now give with my reasons.

Decision and reasons

14. I find a material error of law in the decision of the First-tier Tribunal Judge. The test of whether or not an appeal should be adjourned is whether in light of the overriding objective it is fair and just to do so. In light of the fact there was some evidence, albeit perhaps not entirely satisfactory, that the reason the Appellant had not attended his appeal hearing was because he was in a hospital, I find this was sufficient to discharge the burden of explaining the Appellant's absence. I accept the submission of Mr Hyder that the Appellant's evidence was clearly necessary because an assessment of credibility had to be carried out both in respect of the documentary evidence he had submitted in support of his appeal and the TOEIC issue raised by the Respondent, which was the basis of the Respondent's refusal.

Notice of Decision

15. In these circumstances I find that there has been procedural unfairness. I set the decision of the First-tier Tribunal Judge aside and remit the appeal for a hearing *de novo* before a different judge of the First-tier Tribunal.

Signed Rebecca Chapman

Date 13 December 2018

Deputy Upper Tribunal Judge Chapman