Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03338/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC
On 16 September 2020
At a remote hearing via Skype

Decision & Reasons Promulgated
On 21 September 2020

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

ASIM HUSSAIN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed, Counsel
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, has appealed against a decision of the First-tier Tribunal ('FTT') promulgated on 9 September 2019, dismissing his appeal on Article 8 grounds, against a decision dated 4 February 2019 in which the respondent refused his human rights claim for reasons including an allegation that he fraudulently submitted a TOEIC certificate in a previous application.

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Procedural history

2. In a decision dated 10 February 2020, Upper Tribunal ('UT') Judge Stephen Smith granted permission to appeal. He considered it arguable that the FTT considered the reasonableness as opposed to the fairness of refusing to adjourn the hearing, in the light of the findings it was required to make in relation to the respondent's allegation of dishonesty. He also observed that the materiality of the arguable error would have to be explored at the UT hearing, in view of the matters raised by the FTT about the appellant's earlier non-compliance with directions.

3. In a note and directions sent on 30 April 2020, UTJ Mandalia indicated a provisional view that the matter could be determined without a hearing, subject to submissions from the parties. In further directions sent on 17 July 2020, UTJ Mandalia noted that the appellant placed reliance upon submissions dated 22 May 2020 but the respondent failed to provide any response to directions. UTJ Mandalia was of the view that the UT would be assisted by oral submissions from the parties as to the materiality of any material error of law. The matter now comes before me.

Hearing

4. Mr Ahmed relied upon the grounds of appeal. He agreed with me that there were two grounds of appeal. I address each of those, together with Mr Ahmed's submissions below. Mr Tan invited me to find that the FTT's decision did not contain any material error of law.

5. After hearing from both representatives, I reserved my decision, which I now provide with reasons.

Discussion

Ground 1 - adjournment

6. It is uncontroversial that the appropriate test is whether a refusal to grant an adjournment will cause unfairness - see Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) wherein at [8] the UT said, "*…sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing…*". In SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 the Court of Appeal sets out the straightforward unfairness test in these terms at [13], "*The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair.*"

7. I must therefore consider not whether the FTT's decision to refuse the adjournment application was open to it, but whether it was fair. What did fairness demand of the FTT? In my judgment, on no legitimate view of the

relevant evidence and circumstances could it be said that fairness required adjournment. The appellant and / or his solicitors bore primary responsibility for the position the appellant found himself in, and on the evidence available, it is difficult to see what an adjournment would have achieved beyond further delay. In so finding I bear in mind the following circumstances.

(i) The notice of hearing (20 August 2019) was sent to the appellant, his solicitors and the respondent on 1 May 2019. This required the respondent to provide all evidence relied upon before 29 May 2019, and for the appellant to provide his evidence in response in a bundle as soon as possible after that. The respondent's bundle is dated 8 May 2019. In breach of directions, the appellant submitted no evidence in response to this. It would have been clear to the appellant from the decision under challenge dated 4 February 2019, in relation to which he lodged an appeal on 19 February 2019, that the respondent alleged dishonesty regarding his use of a TOEIC test and this demanded (at the least) a careful explanation in a witness statement.

(ii) The only material communication on behalf of the appellant to the Tribunal came in a fax from his solicitors, sent at 15.56 on 19 August 2019 ('the fax'), the day before the hearing. This requested an adjournment of the hearing for the following reasons:

> "We have been informed that our client has been unwell for the past week or so. He has been unable to give any instructions or have a conference in readiness for appeal. As a result, we have been unable to prepare a bundle in support of the appeal, to which we apologise for. Our client is located in east London, making travel to our office difficult.
>
> Unfortunately, we are unable to attend the hearing tomorrow as our instructions are to seek an adjournment on paper."

(iii) Mr Ahmed submitted that the fax provided two important explanations: (i) the appellant was unable to attend the hearing because he was too unwell, and; (ii) the solicitors were unable to prepare a bundle because the appellant had been unwell for a week. Both of these explanations were at best vague and unparticularised. The solicitors provided very little information in support of an adjournment. I deal with the two matters relied upon by Mr Ahmed in more detail below.

(iv) Given the lateness of the adjournment application, it was not considered on the papers but placed before FTT Judge Abebrese at the hearing itself. The respondent was represented

at the hearing and opposed the adjournment. There was no appearance by the appellant or his solicitors, and no explanation for this beyond the fax. The solicitors offered no explanation as to why they were not instructed to make an application for an adjournment at the hearing itself.

(v) Contrary to Mr Ahmed's submission, the fax simply asserts that the appellant "*has been unwell*". There is no attempt to contend that the appellant remained unwell or that he remained so unwell that he could not attend the hearing. In addition, the application for an adjournment did not set out the nature or extent of the illness and was not accompanied by any evidence. There remains no evidence whatsoever in support of the claim that the appellant was unwell at the time.

(vi) The FTT was provided with no evidence from the appellant in response to the respondent's decision and contention of dishonesty. There remains no such evidence. This constituted a breach of directions. Mr Ahmed submitted that the solicitors sought to explain the non-compliance with directions by asserting that the appellant was unable to give instructions or attend a conference. However, the solicitors did not explain why that could not be done before the appellant became unwell, or when it could be done. The directions required the appellant to provide his evidence and documents as soon as possible after 29 May 2019. After all fairness required a consideration of the appellant's evidence by the respondent, prior to the hearing. Yet there is no explanation as to why a conference and instructions were only being sought in the week preceding the hearing.

8. Fairness is of course a concept which applies from the standpoint of both parties to litigation, and fairness in the procedure also demands that legally represented parties must bring forward the entirety of their case on the occasion upon which it is incumbent to do so, which in this context is in compliance with the FTT directions.

9. I find it quite impossible to characterise as unfair the procedure which was adopted by the FTT, having regard to the history of the matter. Mr Ahmed placed emphasis on three matters, which he submitted meant that fairness demanded an adjournment. He first submitted that the fax provided important explanations. For the reasons I have set out above, I do not agree. The fax was vague and provided very little information. He secondly drew attention to the importance of the appellant's past compliance with Tribunal procedures: he had attended two Tribunal hearings and had never sought an adjournment. If this was of such importance, one would have expected it to

have been highlighted within the fax. The question of fairness focuses upon the fairness of that particular hearing going ahead and any past compliance on the part of the appellant in unrelated proceedings seems to me to be of rather distant relevance. Mr Ahmed also relied upon the importance of evidence of the appellant's innocent explanation to the appeal. Clearly this was significant and likely to be critical. This makes it all the more surprising that a witness statement containing that explanation could not be submitted in good time for the hearing. The appellant had been legally represented by the same solicitors at all material times (up until recently when No. 12 Chambers began acting on behalf of the appeal instead of his previous solicitors), yet there has been no meaningful attempt to explain why directions were not sought to be complied with prior to the week before the FTT hearing. After all, the appellant knew the respondent's case as early as February 2019. The appellant had an extended period of time prior to any unwell period the week before the hearing to set out his case but failed to do so.

10. In addition, the contention in the grounds that the appellant was effectively deprived of an opportunity to give evidence and provide an explanation wholly fails to acknowledge that proceedings before the FTT require an appellant who is legally represented to place their evidence in a witness statement, which acts as examination in chief. The appellant had every opportunity to provide a witness statement and there has been no explanation for his failure to do so before he became unwell, or why he was *too* unwell to do so. There has similarly been no cogent explanation or evidence to support the failure on the part of the appellant or his solicitors to attend the hearing in order to explain the position.

11. Furthermore, the broad assertion that the appellant has been unwell is wholly unsatisfactory. No attempt has been made to explain the nature or extent of the illness or to attach any medical evidence either at the time of the application or since. The application for an adjournment was made very late the day before the hearing.

12. The FTT was fully entitled to observe that the application for an adjournment was not particularised or supported by medical evidence and there was a failure, without explanation, to comply with directions or indeed provide any form of evidence of an innocent explanation. Notwithstanding this, the FTT should have explicitly considered whether fairness demanded an adjournment of the hearing. The FTT erred in law in failing to directly address whether fairness required an adjournment. However, this failure is not material. On any legitimate view of the circumstances, fairness did not require an adjournment for the reasons I have explained above. The appellant and his solicitors simply failed to comply with the requisite procedural requirements without any cogent explanation. In addition, there was no hint in the letter of 19 August 2019 that this could be remedied or when that might be. Despite the failure to consider fairness, the instant case is one of those rare cases in

which it made no difference. When all the relevant circumstances are considered, there has been no unfairness in the FTT proceeding with the hearing.

Ground 2 – approach to respondent's evidence

13. Mr Ahmed submitted that the FTT failed to carefully consider the evidence relied upon by the respondent in order to determine whether she displaced the initial legal burden upon her. The respondent was informed by ETS that after using voice recognition software, there was significant evidence to conclude that this appellant's certificate was fraudulently obtained. The respondent also relied upon the "Revised Look up Tool" for the appellant's test centre, Westlink College. This demonstrated that none of the tests taken on the day the appellant sat his test (15 November 2011) were legitimately obtained. The evidence relied upon by the respondent in this case (generic evidence together with the look up tool) was similar to the evidence accepted to be adequate to displace the initial burden on the respondent – see the review of the authorities in Ahsan and others v SSHD [2017] EWCA Civ 2009. I entirely appreciate that these authorities have highlighted the 'frailties' of the respondent's evidence – see for example SM and Qadir v SSHD [2016] UKUT 229 (IAC) in which the evidence was criticised by the UT *"as displaying "multiple frailties", which left open the possibility that false positive results might have arisen. Nevertheless it was held to be (just) sufficient to transfer the evidential burden to the appellants to show that they had not cheated."* I note the generic evidence has become fuller over time and SM and Qadir should not be regarded as the last word. Mr Ahmed however did not take me to any authority that concluded that the respondent's evidence was insufficient to displace her initial burden. The authorities rather emphasise that where the initial burden is displaced and even in cases where the impugned test was taken at an 'established fraud factory' it was nonetheless important to carefully consider the appellant's explanation, and every ToEIC case was fact-sensitive. I note that there have been instances where the voice-file recording has been challenged. Mr Ahmed did not take me to anything to suggest that this happened in the appellant's case.

14. I therefore asked Mr Ahmed to particularise in what way the evidence relied upon by the respondent was insufficient to displace the initial burden upon her. He was unable to address this directly. He simply submitted that the FTT relied upon what was said in the decision letter and did not consider whether that evidence was sufficient. I again asked why the evidence was insufficient by reference to the authorities. Mr Ahmed did not take me to any authority and simply repeated that the FTT failed to carefully scrutinise the respondent's evidence.

15. Mr Ahmed was unable to demonstrate why the FTT's summary of the respondent's evidence gave rise to a material error of law. Although the FTT

summarised the respondent's position in the decision, this must be seen in the context of this case. The appellant offered no particularised reasons why the respondent's initial burden had not been met (and this remains the case). I entirely accept that the burden was on the respondent. The authorities suggest that the respondent prima facie displaced that burden. Mr Ahmed offered no clear reasons as to why that was not the case here. Instead, he submitted that the FTT was wrong to confuse the evidence of Dr Harrison and Professor French. I invited Mr Ahmed to explain how any such error was material. He was unable to do so save to repeat that the FTT did not carefully consider the evidence relied upon by the respondent.

16. Mr Ahmed was therefore unable to identify why any failure to carefully consider the respondent's evidence was a material error of law in the circumstances of this case wherein (i) there was no attempt on the part of the appellant or his legal representatives to explain or reason why the generic evidence and look up tool were inadequate and (ii) there was no innocent explanation provided at all. In the circumstances, ground 2 does not demonstrate a material error of law.

Decision

17. The decision of the FTT did not involve the making of an error of law and I do not set it aside.

Signed: *UTJ Melanie Plimmer*
Judge of the Upper Tribunal

Dated: 17 September 2020