Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02000/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 14 April 2014	**On 24 April 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

DWAYNE ANTHONY NEWLAND

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel, instructed by Greenland Lawyers LLP Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of the First-tier Tribunal (a panel comprising First-tier Tribunal Judge Jackson and Mr G H Getlevog) in which they dismissed his appeal against the decision of the respondent made on 27 September 2013 to make a deportation

order against him pursuant to Section 5(1) of the Immigration Act 1971 and Section 32(5) of the UK Borders Act 2007.

2. The appellant's history arrived in the United Kingdom on 26 December 2001 with leave to enter which expired on 1 January 2003. He has been convicted of several offences in connection with the possession of controlled drugs. On 15 November 2012 the appellant was convicted at Wood Green Crown Court of violent disorder and burglary with intent to steal and was sentenced to two years and four months' imprisonment for violent disorder with an additional three months consecutively for burglary.

3. The respondent considered that she was required to make a deportation order against the appellant because as he did not meet the requirements of paragraphs 399 or 399A of the Immigration Rules in respect of family and private life. Although he had a son and had established family life in the United Kingdom, the respondent considered that there was no ongoing genuine or subsisting relationship with him; that the child could continue to be cared for by his mother in the United Kingdom; and, that were any genuine relationship subsisting between the child and the appellant or the appellant and his former girlfriend either could be maintained from or within Jamaica. She concluded that it would not breach the United Kingdom's obligations pursuant to Article 8 to remove the appellant from the United Kingdom.

4. On the day of the hearing, Mr Balroop who appeared below as he does before me sought an adjournment of the hearing on three grounds:-

   (i) that the appellant had recently changed legal representatives and that the new representatives have not yet been able to have a proper legal visit with him and take proper instructions;

   (ii) that Counsel had only been instructed the day before;

   (iii) that there was a need for the appellant to produce evidence in response to the social services report which was produced by respondent on the day of the hearing which includes evidence from the appellant's child's mother.

5. The panel refused the adjournment on the basis that:-

   (i) the appellant had been legally represented for a significant period of time, a bundle including witness statements had been submitted on his behalf (six);

   (ii) that the issue raised in the report relied upon by the respondent was already in issue although not in the same detail; and

   (iii) that it was highly unlikely that any evidence from child's mother would be forthcoming with or without an adjournment.

6. The panel did however permit a short adjournment until the afternoon to allow Counsel to take further instructions. They then heard the appeal and dismissed it. The Tribunal noted [43] that the appellant had confirmed that he was not in a subsisting relationship with either the mother of his son or a former partner. They found that the appellant did not have an ongoing genuine or subsisting relationship with his son [44], there being no evidence of the appellant seeking to maintain contact by phone or even birthday cards or Christmas cards, and finding the appellant had not had a genuine relationship with his son at least since he had been prison; that the appellant no longer has a family relationship with his mother or siblings; that the appellant had no significant or exceptional private life ties in the United Kingdom, having at best established only a limited private life here [46].

7. The Tribunal also found, having had regard to the best interests of the child [49] in light of the NOMS Report and the information supplied from Hackney Children's Services, to whom the son and mother were known, that there is a significant history of continuing domestic violence between the appellant and his former partner including threats to kill her and her mother, concerns of the effect on the child, that it would be in the child's best interests not to have any contact with the appellant [51] and that if the appellant wished to establish a relationship with his son in the future then he could make contact with him from Jamaica [51] and that [62] the appellant's deportation was proportionate.

8. The appellant sought permission to appeal to the Upper Tribunal on the grounds that the panel's refusal to adjourn the matter amounted to a procedural unfairness amounting to an error of law as the appeal had proceeded:-

   (i) in the absence of proper instructions from the appellant due to the late transfer of representation [5];

   (ii) that neither the appellant nor his representatives had any notice of the adverse summary report from Hackney Social Services [6];

   (iii) that the representatives had been unable to obtain, due to time constraints, evidence to support the appellant's claim of family life.

9. On 10 March 2014 First-tier Tribunal Judge Ford granted permission to appeal, also extending the time permitted. Judge Ford stated:-

> It was arguably unfair to refuse the appellant an adjournment given the grounds state that neither the NOMS Report nor the social services report was available to the appellant or his representative before the hearing the appellant did not have the opportunity to call evidence to address the concerns of the appellant expressed at paragraph 35 (**SH (Afghanistan) [2011] EWCA Civ 1284**).

10. The respondent has since the grant of permission produced a detailed reply pursuant to Rule 24.

11. Mr Balroop relied on the grounds of appeal submitting that whilst the issue of domestic violence had been raised in the NOMS Report, there was a qualitative difference between that very short reference and the detailed, extensive report produced on the day of the hearing. Further, that report had been produced contrary to directions and contains a number of factual errors in particular the allegation that the appellant had been back to Jamaica and has a child there which was not substantiated.

12. Mr Melvin relied on his Rule 24 statement, submitting that there was no merit in the submission that the panel should have adjourned the matter to permit rebuttal evidence in respect of the information from Hackney Social Services. He submitted that even with that the outcome in this appeal was inevitable and on that basis any error was not capable of affecting the outcome. He submitted that the appellant had been put on notice of the domestic violence issue and had failed to provide any proper explanation for changing representatives.

13. There is little merit in the submission that the Tribunal acted unfairly in failing to adjourn the matter owing to the late instruction of Counsel and late change in representatives. No proper explanation has been provided as to why this was necessary; no evidence has been adduced of any complaints made by the appellant or his current representatives to the previous representatives; nor are their claimed failings particularised.

14. There was in this case no full NOMS Report merely a summary which appears in the respondent's bundle ("RB") at Appendix G. In the summary at Section 2 – Offending Related Information – Risk of Serious Harm it is stated that an OASys assessment has been completed on 7 March 2013 but this has not been produced. Section 2b provides:

> 2B. Risk of Serious Harm Level: Medium – to children and known adult
> Low – to public and staff
>
> Summarise the risk factors – who is at risk, of what, and when?
>
> - History of domestic incidents with ex-partner – risk of violence/threats to ex and future partners. Also risk of children being caught up in this.
>
> - Risk of burglary/theft.
>
> - Previous assessment indicates some gang issues as he reported not being able to report to probation in Highgate for this reason.

15. The respondent's bundle was served on the First-tier Tribunal on 24 October 2013. There is no indication that it was not served on the appellant's then representatives.

16. Directions for the hearing which took place on 21 January 2014 were issued to all parties on 9 October 2013. These provide that all documents are to be filed no later than ten days before the hearing and the parties'

attention is drawn to Rule 21(b) of the Immigration Appeals (Procedure Rules) 2005 which provides:-

> The Tribunal must not, in particular, adjourn a hearing on the application of a party in order to allow the party more time to produce evidence, unless satisfied that –
>
> (a) the evidence relates to a matter in dispute of the appeal;
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> (b) that it would be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence; and
>
> (c) where the party has failed to comply with directions for the production of the evidence, he has provided a satisfactory explanation for that failure.

17. Rule 51 of the same rules provides as follows:-

> 51. (4) Where the Tribunal has given directions setting time limits for the filing and serving of recent evidence, it must not consider any written evidence which is not filed and served in accordance with those directions unless satisfied that there are good reasons to do so.

18. Despite the express provisions of this Rule, there is no indication in their determination that the Tribunal gave any consideration to the duty imposed by it. Instead, they simply accepted the document adduced by the respondent on the day of the hearing which had not been served on the appellant. Further, rather than offer the appellant the opportunity to adduce evidence in rebuttal, the Tribunal proceeded on the basis that it would not be available.

19. While the issue of domestic violence and the concern that the child may be caught up in this are raised in the NOMS Report, what is said in the CCD family separation reference adduced on the day of the hearing goes into significantly greater detail and is substantially and qualitatively different. It refers amongst other things to referrals to social services; to the child's mother obtaining restraining orders; to arrests for ABH, threats to kill and an allegation that the appellant had sought to persuade the child's mother to have an abortion. Mention is also made that no further action had been taken as the father had left the country at some point in 2009 and that the appellant has a further child in Jamaica. Much of this information is potentially significant.

20. In **MM (unfairness; E&R) Sudan [2014] UKUT 00105 (IAC),** a decision of the President of the Upper Tribunal, the Honourable Mr Justice McCloskey and Upper Tribunal Judge Southern , noted:

> The matrix of this appeal, rehearsed above, prompts reflection on the content and reach of one of the cornerstones of the common law, namely the right of every litigant to a fair hearing. The right in play is properly described as fundamental, irreducible and inalienable.

21. Having considered the relevant case law they distilled the principles derived[15]:

:-

(1) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the **merits** of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.

(2) It is doctrinally incorrect to adopt the two stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.

(3) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.

(4) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

22. While acknowledging that there may be cases in which, in the field of judicial review, cases where denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair[17], the remedy there being discretionary, that is not so in hearings of this type, stating: [18]

> … an appeal on a point of law from a decision of the First-tier Tribunal to the Upper Tribunal, to be contrasted with an application for judicial review based on alleged procedural unfairness. Such appeals are governed by section 11 of the Tribunals, Courts and Enforcement Act 2007, which provides in subsection (1):
>
> > "For the purposes of subsection (2), the reference to a right of appeal is to a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-Tier Tribunal other than an excluded decision."
>
> We are satisfied that the fourth of the principles formulated by Bingham LJ (*supra*) applies fully to appeals of this *genre*, for two main reasons. The first is that where either party to an appeal before the First-tier Tribunal is denied a fair hearing, this constitutes an error of law. The second is that in determining appeals, this Tribunal is not concerned with **the merits** of the decision of the lower Tribunal. Rather, its function is to decide whether, within the compass of the grant of permission to appeal, the decision of the First-Tier Tribunal is vitiated by a material error of law. This analysis is reinforced by section 12 of the 2007 Act. This provides, *inter alia*, that where the Upper Tribunal is satisfied that the decision of the First-Tier Tribunal "*involved the making of an error on a point of law*" and orders that the decision be set aside, it may re-make the decision. If it decides to do so, it will, in effect, conduct an appeal on the merits, either applying the correct legal principles in play to findings of fact preserved from the First-tier Tribunal determination or, in cases where those findings have given rise to the relevant error of law, evaluating all the evidence, forming its own views and making its own findings and conclusions. The timing of this exercise, where

performed, is telling: it is separated from the error of law hearing, whether it is conducted immediately thereafter or, where unavoidable, at a later date. It is a re-making exercise.,

23. In this case, given the serious and detailed nature of the allegations put forward in the material presented to the appellant only on the day of the hearing, an adjournment for a matter of hours to allow for instructions to be taken was wholly inadequate in terms of permitting him an opportunity to obtain evidence in rebuttal, and thus the question "Did the decision of the First-tier Tribunal involve the making of an error of law" must be answered in the affirmative.

24. Further, given that the evidence set out in the document served on the date underpins to a substantial extent the panel's finding that it would not be in the appellant's child's best interest for him to remain in the United Kingdom, it cannot be said that this document and the information in it did not form a central plank of the respondent's case. The appellant was ambushed by the respondent and the First-tier Tribunal acquiesced in this. They thus permitted a procedural unfairness to proceed. Accordingly, I am satisfied that the determination of the First-tier Tribunal did involve the making of an error of law with the result that the appellant did not receive a fair hearing.

25. Following **MM** at [26], I consider that given the nature of the error, the matter should be remitted to the First-tier for it to make a fresh determination on all issues in order that the appellant has a fair hearing.

SUMMARY OF CONCLUSIONS

1 The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2 I remit the matter to a differently constituted First-tier Tribunal for the appeal to be heard afresh. None of the findings of fact made by the First-tier Tribunal in its earlier determination are preserved.

Signed Date: 22 April 2014

Upper Tribunal Judge Rintoul