Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07256/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th January 2015	**On 12th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR KEHINDE TEMIDAYO ALABI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Ofei-Kwatia, Counsel instructed by Fitzpatrick & Co. Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant in this case is a citizen of Nigeria who was born on 10th August 1970. He appeals from the decision of First-tier Tribunal Judge Paul, promulgated on 6th October 2014, to dismiss his appeal against the Secretary of State's refusal to grant him further leave to remain on private and family life grounds.

2. Before turning to the Grounds of Appeal, it is necessary briefly to give a history of the Appellant's immigration history and, more particularly, to the history of these proceedings.

3. The Appellant first arrived in the United Kingdom, with leave to remain as a student, in 2004. He has remained here, lawfully and continuously, ever since. On 5th December 2013, Fitzpatrick & Co. Solicitors, acting on behalf of the Appellant, wrote to the Home Office enclosing his application and setting out his case. It was substantially based upon a request to give him further leave to remain in order to resolve the marital difficulties which he was experiencing at that time, in the confident belief that if he was granted further leave to remain he would be able to resolve them and thus become reconciled with his wife.

4. However, another ground was put forward in that letter, from which I now quote the relevant passage:

> "Our client has resided lawfully in the United Kingdom continuously for over nine years and we urge you to take proper account of our client's length of lawful residence in the UK.
>
> This is particularly important given that the Secretary of State operates a policy whereby if a person has been in the UK for between six to eight years caseworkers can consider granting some form of leave. This policy primarily applies to persons who have been in the UK without any leave and with no significant connections to the UK or any compelling circumstances in their case.
>
> Our client on the other hand has strong links to the UK. The fact that such a policy exists is significant when assessing the Secretary of State's interests in the balancing exercise."

I interpose briefly to mention that that was clearly a reference to the balancing exercise when weighing the proportionality of removal, as a result of refusal of leave to remain, as against the public interest in maintaining a firm and consistent policy of immigration control. I resume my quotation from the letter:

> "This policy is referred to at page 6 of the attached briefing paper. Although the reference to the policy is in the context of the legacy exercise, it is clear that the policy is a freestanding policy applicable to all persons in respect of whom removal is being contemplated."

The letter proceeds to quote, at some length, the relevant passages from the policy paper in question.

5. That Appellant's application was refused on 17th March 2014, and he exercised his statutory right of appeal to the First-tier Tribunal within relevant time limits.

6. Notice of the hearing of the appeal was issued on 14th March 2014. That notice stated that the appeal would be heard on Monday 22nd September 2014, at 10am. The notice was issued not only to the Secretary of State and to the Appellant, but also to Fitzpatrick & Co., the solicitors who had lodged the application in the first place and who had written the letter to which I have previously made reference.

7. It follows from the above, that rather more than six months' advance notice was given of the date of the hearing. Nevertheless, just three days before the hearing date, Fitzpatrick & Co. faxed a letter to the First-tier Tribunal, which is dated the 19th September 2014. This letter is critical to the basis upon which it is now suggested that the First-tier Tribunal made an error of law, and I therefore quote it in full:

> "Dear Sirs
>
> Hearing Date: Monday 22nd September 2014 [reference is then given to the details of this appeal]
>
> We write regarding the appeal of the above-named Appellant.
>
> We are instructed that due to financial constraint the Appellant is unable to afford the required legal representation for an oral hearing and therefore requests for a paper appeal instead.
>
> The Appellant therefore requests that the oral hearing be adjourned and relisted to enable him to provide written submissions for the paper appeal pursuant to the relevant procedure.
>
> We wait to hear from you with confirmation that the appeal is now listed as a paper appeal and the time limit for him to submit the written submissions."

8. In his determination, Judge Paul noted the contents of that letter, which he summarised at paragraph 5 of his decision. He questioned the Appellant with a view to seeking further and better particulars of the nature of the request for the adjournment, and the Appellant's replies are summarised in paragraph 7 of the determination:

> "First of all, the [Appellant's] separation had come about from his wife when she had refused to let him return to the family home. That was a continuing situation and it explained the lack of presence at the appeal or indeed the fact that her passport had at no stage been provided to the Secretary of State. The Appellant explained that he did have a mother in Nigeria but he had a sibling resident in the UK and that he was currently employed. If at all possible he wanted more time to consider ways in which he could present his case. Mr Zukunft did not make any contrary observations" [Mr Zukunft being the Presenting Officer].

9. The judge gave his reasons for refusing the application to adjourn at paragraphs 8 and 9 of his decision:

> "8. I decided that, rather than adjourning the case for a paper appeal, it was prudent to deal with the case with the Appellant here. Once it became plain that the backbone to the Appellant's case – namely that his marriage/relationship was at an end – he clearly had no basis under the family life provisions for remaining in the UK. Furthermore, as was foreshadowed in the refusal letter, he could not claim private life under the Rules either. Once the Appellant had confirmed that he had a mother in Nigeria, combined with the fact that he had spent the major part of his life there, it seemed to me impossible for the Appellant in any way to improve his case by having it adjourned so that he could make written submissions in respect of a paper appeal.
>
> 9. I therefore refused the adjournment and, as set out above, took evidence from the Appellant in order to enable me to determine this appeal."

10. I turn now to the Grounds of Appeal in which it is argued that the First-tier Tribunal made a material error of law in refusing the application for an adjournment. They begin by pointing out that the Tribunal had before it the letter of 19th September, which I have already quoted (above). It is then said, at paragraph 2, that regardless of any prospect of improvement in the Appellant's case, the Appellant was entitled to advance his case "completely and with the assistance of submissions by his representative". It argues that the reason given by the judge for refusing to adjourn undermines this fundamental right. It continues as follows: "It was not the judge's position to come to a provisional view on the merits of any submissions".

11. The Grounds thereafter set out what those submissions would have been, although this could not of course have been known to the judge who refused the application to adjourn. The essence of the argument, and I mean no disrespect by simplifying and summarising it, is as follows. The Appellant had come very close to fulfilling the threshold criteria under paragraph 276B of the Immigration Rules for indefinite leave to remain, namely, ten years' continuous lawful residence. That is said to be an important factor in considering the proportionality of removal for the purposes of an assessment under Article 8 of the Human Rights Convention.

12. Those grounds have been very eloquently and ably elaborated upon by Miss Ofei-Kwatia on behalf of the Appellant. She submitted that by proceeding with the hearing and not acceding to the request to adjourn, the judge had deprived the Appellant of a fair hearing and, more specifically, what is said to be the fundamental right of being legally represented. She further submitted that in light of what we now know would have been the Appellant's argument for holding that his removal

would be disproportionate, that the failure to grant the application for an adjournment was "more likely than not" to have been material to the outcome of the appeal.

13. In response, Mr Whitwell expressed a certain degree of cynicism about the reasons for requesting an adjournment, by suggesting that it may well have been with a view to extending the period of the Appellant's leave under Section 3C of the Immigration Act 1971 so as to be able to claim the full period of ten years' continuous lawful residence for the purposes of paragraph 276B of the Immigration Rules. However, whilst I agree that the making of an application for an adjournment 'at the eleventh hour' is indeed suspicious, I am not satisfied, on a balance of probabilities, that it was made with such an ulterior motive. Secondly, Mr Whitwell drew attention to the fact that the letter was a request to adjourn so that the Appellant himself, not his representatives, could make written representations. Thirdly, absent a threat to a person's life or liberty, Mr Whitwell submitted that there is no fundamental right of legal representation.

14. I have absolutely no hesitation in holding that the judge did not act unfairly in refusing this rather curious request for an adjournment. I describe it as 'curious' because, if the Appellant could only afford legal assistance in making written as opposed to oral submissions, one might have expected the representatives simply to request that the hearing of the 22nd September 2014 be vacated forthwith and for it to be determined on the papers instead. This would have avoided an oral hearing altogether, and it would also have avoided the inconvenience to the appellant of attending it.

15. Moreover, there was no obvious reason why such a request could not have included the written submissions to which it is said that the Tribunal should have had regard prior to determining the appeal. The failure to take this simple and time-saving step is all the more surprising given that the arguments that are now belatedly advanced in the Grounds of Appeal to the Upper Tribunal are essentially the same arguments that the self-same representatives had put forward in their letter of the 5th December 2013, very nearly 9 months before the appeal was due to be heard. It is thus far from clear why the representatives should have been making an application to adjourn, whether at such a late stage in the proceedings or indeed at all. Finally, the letter of the 19th September 2014 failed to give any indication as to the period for which an adjournment was being sought in order to allow for written submissions to be provided.

16. Having regard to the all the above circumstances, including the timing and vagueness of the reasons for seeking an adjournment, and applying the overriding objective of dealing with appeals fairly and expeditiously, I am satisfied that the First-tier Tribunal did not err in law by deciding to refuse the application.

17. For the sake of completeness, I would add that even if I had held that the judge erred in refusing the request for an adjournment, this was not in my judgement material to the outcome of the appeal. This is for the following reasons.

18. The effect of the arguments that are now being put forward is that it would be disproportionate to remove the Appellant in pursuit of the legitimate aim of immigration control for the economic wellbeing of the country because it is the Secretary of State's policy, as expressed in paragraph 276B of the Immigration Rules, to allow people to remain indefinitely if they can prove ten years' continuous lawful residence in the United Kingdom. However, the fact that it happens to be the policy of the Secretary of State to grant leave to remain to a suitable candidate who has lawfully resided in the United Kingdom for a continuous period of 10 years, is in my judgment wholly irrelevant to the question of whether it would be disproportionate to remove that person for the purposes of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The argument is in truth what has often been described, somewhat inelegantly, as a "near-miss" argument.

19. Moreover, a grant of leave under paragraph 276B is subject to further considerations. These include the applicant's age, personal history (including character, conduct, associations, and employment history), domestic circumstances, and compassionate circumstances. It cannot therefore be assumed that a person who has acquired ten year's lawful residence will necessarily be granted leave to remain under that paragraph. This serves further to emphasise the immateriality of the requirements of paragraph 276B of the Immigration Rules to an assessment under Article 8 of the Convention. That is not to suggest that length of lawful residence is immaterial to such an assessment. It does however mean that the question of whether that period meets (or comes close to meeting) the requirements of any Immigration Rule, other than paragraph 276ADE, does not have any bearing upon the issues that arise for consideration when undertaking such an assessment.

20. So, for all the above reasons, I hold that the Tribunal did not err in law by refusing the application to adjourn and, even if it did, that the outcome of the appeal would not have been any different if it had granted the application. This appeal is accordingly dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Kelly