Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53823/2013

THE IMMIGRATION ACTS

Heard at Plymouth Magistrates' Court	**Decision & Reasons Promulgated**
On 9 March 2015	**On 26 March 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

DAVID EDDIE MANGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Knapper of Knapper Fursdon Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Kenya who was born on 28 April 1953. It is not clear when the appellant entered the UK. However, he was issued with a visit visa valid from 23 July 2002 until 23 January 2003 during which time he entered the UK. Thereafter, he has remained in the UK without leave.

2. On 25 May 2009, the appellant suffered a cerebral vascular event (dense haemorrhagic stroke) which has left him with left-sided weakness, reduced

mobility and psychological consequences. As a result of this event, the appellant has been in the care of Social Services. He is currently resident in a care home in the Plymouth area where he receives 24 hour care.

3. In October 2010, the Plymouth Social Services informed UKBA that the appellant wished to return to Kenya and on 27 October 2010 the appellant was served with a decision to remove him as an overstayer. However, the appellant changed his mind about returning to Kenya and did not leave the UK. On 30 March 2012, he made an application to remain in the UK relying on Arts 3 and 8 of the ECHR. The basis of his claim was his medical condition. On 11 October 2013, the Secretary of State refused the appellant's claim for leave relying upon Arts 3 and 8 of the ECHR. Further, on that date, the Secretary of State made a further decision to remove the appellant as an overstayer under s.10 of the Immigration and Asylum Act 1999.

4. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Britton on 7 July 2014. The appellant did not attend and was not represented. Judge Britton dismissed the appellant's appeal on the basis that it had not been established that the appellant's removal would breach Arts 2, 3 or 8 of the ECHR. The appellant appealed to the Upper Tribunal on the basis that the judge had failed to consider an application for an adjournment made on the day of the hearing in writing by the appellant's (then) representatives, Duncan Lewis Solicitors on the basis that the appellant was unwell to travel to court.

5. On 14 August 2014, the First-tier Tribunal (Judge P J M Hollingworth) granted the appellant permission to appeal.

6. Thus, the appeal came before me.

7. The hearing of this appeal was arranged at Plymouth Magistrates' Court because the appellant's carers had indicated by letter dated 12 September 2014 that the appellant was unable to travel to the hearing centre in South Wales. The care home would, however, be able to support his attendance at a hearing in the Plymouth area. That matter was considered at a 'for mention' hearing before me on 27 January 2015 together with a letter dated 1 August 2014 in which Duncan Lewis informed the Tribunal that they were no longer instructed by the appellant.

8. At the hearing at Plymouth Magistrates' Court, Ms Amanda Knapper informed me that she was now instructed by the appellant but that she had been unable to take full instructions from the appellant in the time available. She nevertheless indicated that she was in a position to make submissions in relation to the error of law issue even though she had no instructions on the substantive merits of the appellant's appeal.

9. Mr Richards, who represented the respondent, agreed that the error of law issue should be determined initially and, if established, a subsequent hearing would be necessary.

10. Ms Knapper submitted that the appellant had made an application for adjournment based upon the fact that he was unwell to travel to court on the day of the hearing. The judge had made no reference to that application in his adjournment and as a result the appellant had been denied a fair hearing on the basis of a procedural irregularity.

11. Mr Richards accepted that the adjournment application had been made but submitted that any error was immaterial as no unfairness arose from the judge's failure to consider the adjournment application. Mr Richards accepted that the appellant clearly does have serious health difficulties but there was no indication that the failure to adjourn had produced any prejudice. He submitted that there were no real credibility issues in the appeal. The key issue was whether the appellant's health condition met the threshold for Arts 2 or 8 of the ECHR. Mr Richards submitted that the judge had ample basis to conclude that it did not.

12. It is accepted that the appellant's (then) representatives, Duncan Lewis, made a written application to the Tribunal on the day of the hearing to adjourn that hearing on the basis that the appellant was "too unwell to travel to the court". The letter continues:

> "This conversation was in the last hour, and as such we do not yet have any medical evidence to support this. The appellant did inform us that the GP had been called to see him this morning after a particularly difficult night".

13. Of course, the background, which would have been obvious to the judge, is that the appellant has serious health difficulties as a result of his stroke and is resident in a care home where he receives round-the-clock care.

14. It is a fundamental tenet of justice that a litigant should have a fair opportunity to attend any judicial proceedings in which he is involved. There is, of course, no absolute right to attend a hearing and the (then) Procedure Rules for the First-tier Tribunal recognise a number of situations where a Tribunal <u>may</u> hear an appeal in the absence of a party (see rule 19 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230 as amended)). Similar provisions can be found in the current Tribunal Procedure Rules 2014 (SI 2014/2604) in rule 25.

15. It does not seem that the adjournment application was brought to the attention of the judge. It had, nevertheless, been made and that is accepted by Mr Richards on behalf of the respondent. Through no fault of his own, the judge erred in law by failing to consider that adjournment application. The application had been made but was not made known to the Judge. Given the circumstances of the appellant identified in the Tribunal's papers, the judge (had he considered the application) would have been faced with an appellant who had demonstrable health problems and lived in a residential home a considerable distance from the hearing

centre in Newport. On that evidence, I am unable to conclude that the judge would have necessarily refused the application. Indeed, the application had, in my view, a strong prospect of success. The appellant was, as a consequence, denied an opportunity to attend the hearing of his appeal. I do not accept Mr Richards' submission that the loss of that opportunity was not unfair because no issues of credibility arose and the key issue was whether the appellant's health condition was such as to cross the threshold to establish a breach of Art 3 or 8 of the ECHR. The denial of an opportunity to attend his hearing, in the circumstances of this appeal, was in itself unfair – it removed his opportunity to attend his own proceedings. In any event, one of the issues in the appeal concerned the family circumstances of the appellant in Kenya. He was denied an opportunity to give any oral evidence relevant to that issue.

16. For all these reasons, there was a procedural irregularity amounting to an error of law in the First-tier Tribunal's decision to dismiss the appellant's appeal.

17. At the conclusion of the representatives' submissions, I indicated that was my decision. I invited submissions on whether the appeal should be remitted to the First-tier Tribunal or retained in the Upper Tribunal. Ms Knapper invited me to remit the appeal and Mr Richards invited me to retain it in the Upper Tribunal.

18. In my judgment, the proper course for this appeal is that it should be remitted to the First-tier Tribunal. The nature of the error of law is such that the appellant has effectively been denied a first appeal hearing and that error can only properly be cured by remitting the appeal to the First-tier Tribunal for a hearing at which the appellant can attend.

Decision and Disposal

19. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision is set aside.

20. The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Britton. Because of the appellant's circumstances, which prevent him from attending a hearing at the Newport Hearing Centre, I invite the First-tier Tribunal to seek to list the appeal (as was the appeal before me) in Plymouth.

Signed

A Grubb

Judge of the Upper Tribunal