



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/50347/2014**

Appeal number:

THE IMMIGRATION ACTS

Heard at Manchester

On April 22, 2016

**Decision and Reasons
Promulgated**

On April 26, 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR JOSEPH OSCAR IGNATIUS STUART
(NO ANONYMITY DIRECTION)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sarwar (Counsel)

For the Respondent: Mr McVeety (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a citizen of Guyana. He entered the United Kingdom on May 15, 2006 with limited leave as a spouse. His leave was subsequently extended enabling him to remain in the United Kingdom until February 16, 2014. On February 13, 2014 he applied on form FLR(O) for leave to remain on the basis of his family life.

2. The respondent refused his application on November 26, 2014 and took a decision to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.
3. The appellant appealed that decision on December 12, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.
4. The appeal came before Judge of the First-tier Tribunal Herwald (hereinafter referred to as the Judge) on March 20, 2015 and in a decision promulgated on March 30, 2015 he refused his appeals under both the Immigration Rules and article 8 ECHR.
5. The appellant lodged grounds of appeal on April 13, 2015 submitting the First-tier Judge had acted unfairly by refusing to adjourn the appellant's appeal. Permission to appeal was granted on June 2, 2015 by Judge of the First-tier Tribunal Tiffen. In a Rule 24 response dated June 11, 2015 the respondent opposed the appeal arguing the findings made were open to the Judge.
6. The matter came before Upper Tribunal Judge Bruce on October 14, 2015 who adjourned the hearing to enable the appellant to obtain representation. The matter was then listed before myself and the appellant was represented as set out above.
7. I heard submissions from both representatives after which I reserved my decision.
8. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I make no order.

SUBMISSIONS

9. Mr Sarwar submitted in refusing to adjourn the hearing the Judge applied an incorrect test. He referred to the test set out in Nwagwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and submitted that refusing the adjournment because it was made at a very late stage in the proceedings amounted to an error in law. The appellant had been unrepresented and should have been given some leeway especially as one of the reasons for refusing the appellant's appeal was due to the lack of evidence from the appellant. A second error, he submitted, as the Judge's approach to "suitability" and Section S-LTR 1.5 or 1.6 of Appendix FM of the Immigration Rules. The Judge failed to give reasons for finding his presence here was not conducive to the public good.
10. Mr McVeety relied in the Rule 24 response and submitted there was no error in law. He submitted the neither the grounds nor the oral submissions identified what documents would have assisted the Judge in addressing the issue of suitability. The Judge had heard a lot of the evidence and concluded an adjournment would not assist

him and ultimately he gave reasons for refusing the appeal on suitability grounds. The Judge applied the correct test and there was no error in law.

11. Mr Sarwar indicated documents from Alcoholics Anonymous, his daughter, evidence the restraining order had ended were all now available. At paragraph 18(a) of his decision the Judge made reference to the appellant's failure to produce the very evidence he said was missing.

DISCUSSION AND FINDINGS

12. In considering this application, I have regard to the matters raised before me as well as taking into account the history of this matter.
13. The appellant submitted his own application but having been refused he then sought legal advice. His former solicitors, Broudie Jackson and Cantor, filed his grounds of appeal on December 12, 2014. On the day the matter appeared before the Judge the appellant appeared unrepresented. It is clear from the record of proceedings that the Judge spent the first part of the hearing discussing this with the appellant. The following exchange explains the position:

Judge Why are you unrepresented.
Appellant I couldn't afford solicitors so they said I should go to court on my own.
Judge You have not produced a bundle?
Appellant They gave me the file two days ago.
Judge Any people you want me to see today?
Appellant No. I am not too good and I am very stressed.
Judge Witnesses today?
Appellant Wife came with me.

14. During that exchange the appellant did not indicate to the Judge there were any documents he wished to produce and of course it should not be overlooked that the grounds of appeal had been lodged on December 12, 2014 and the appeal hearing was taking place three months later.
15. The Judge then asked him questions about his offending behaviour and circumstances and it is during this questioning that the appellant asked for an adjournment. The record of proceedings does not indicate what it was hoped an adjournment would achieve but it seems, from the Judge's decision, that he was not prepared to adjourn the case and he refused the adjournment and the record of proceedings indicates that the hearing continued with the Judge asking him a number of questions about his case and in particular why he wished to remain in the country. The Judge then took evidence from the appellant's wife before taking submissions both from the presenting officer and the appellant.

16. It is against that background that the appellant lodged grounds of appeal and the first ground of appeal alleges procedural unfairness.
17. Rule 4(3)(h) of the 2014 Procedure Rules empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well.
18. The overriding objective is deal with cases fairly and justly. This is defined as including-
 - "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively;
 - (e) avoiding delay so far as compatible with proper consideration of the issues".
19. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that if a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects. These include:
 - (a) a failure to take into account all material considerations;
 - (b) permitting immaterial considerations to intrude;
 - (c) denying the party concerned a fair hearing;
 - (d) failing to apply the correct test; and acting irrationally.
20. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: namely, "was there any deprivation of the affected party's right to a fair hearing?"
21. Mr Sarwar submits that the Judge acted unfairly in refusing the appellant's adjournment request because he found it was not in the interests of justice to adjourn the case at the late stage of the case. Mr McVeety submits that until today neither the appellant, his former solicitors nor the grounds of appeal had identified what evidence would be called and in any event this appeal was bound to fail under the Rules and the evidence would not have made any difference.
22. In considering this appeal, I do have regard to the fact the appellant was unrepresented but he had been represented up two days before

the hearing. The Judge noted he had no bundle of evidence and in paragraph 18 of his decision he found against the appellant because of that lack of evidence.

23. Mr McVeety's submissions on the appellant's ability to satisfy the Rules may well have some merit but the documents being adduced could have had some bearing on the article 8 claim.
24. Mr Sarwar's submissions on procedural fairness carry some weight and the fact the appellant's application was made late, in circumstances where he was unrepresented at the last minute, meant the Judge had to consider "fairness" carefully. As the Tribunal in Nwaigwe made clear the test for me is not whether the Judge acted fairly but was there any deprivation of the affected party's right to a fair hearing?
25. The Judge refused the appellant's appeal having regard to his offending behaviour finding that he could not satisfy the suitability requirements of the Rules and removing him would not be disproportionate.
26. The fact there are documents that would have assisted the Tribunal about his alcohol problems, whether he was prevented from seeing his family and his response to his probation order were documents that a Judge was entitled to expect to see and in view of the fact the appellant had only recently lost his representation was something he should have attached more weight to.
27. I therefore find that there was unfairness and I set aside the Judge's decision under both the Rules and article 8 ECHR.
28. I raised with both representatives where this appeal should be heard in the event there was an error in law. Both indicated that if there was an error then in light of Part 3, Section 7.1 to 7.3 of the Practice Statement the matter should be remitted to the First-tier Tribunal.
29. Mr Sarwar indicated that he now had evidence that he wished to file. I direct that any additional evidence must be served on both the Tribunal and other party in accordance with the current Procedural Rules.

DECISION

30. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.
31. The appeal is remitted back to the First-tier Tribunal for these issues to be addressed hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

32. I direct that the matter be listed before any First-tier Judge other than Judge of the First-tier Tribunal Herwald.

Signed:

A handwritten signature in black ink, appearing to read "SPAL" with a flourish underneath.

Deputy Upper Tribunal Judge Alis