Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00126/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2017	**On 20 February 2018**
Extempore	

Before

THE HONOURABLE MR JUSTICE JULIAN KNOWLES
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M A M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: Ms U Dirie, Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal promulgated on 22 June 2017 whereby it allowed the respondent to this appeal, Mr MAM's appeal against the Secretary of State's decision to deport him. The ground of appeal advanced by the Secretary of State is effectively that the Secretary of State was denied a fair opportunity to present her case at the hearing before the First-tier Tribunal in that the judge effectively proceeded to determine the case without having heard evidence and without having heard submissions.

2. The facts of the case, very briefly because it is unnecessary to set out too much detail today, the respondent, Mr M A M, there being an anonymity direction, is a citizen of Sierra Leone and he is married to Mrs C V M, who holds joint Dutch and British nationality and he is therefore a direct family member of an EEA national. He appealed to the First-tier Tribunal against the decision of the Secretary of State on 27 February 2016 to make a deportation order against him under Section 5 of the Immigration Act 1971. The facts underlying the decision to deport MAM was the respondent's history of criminal offending, in particular in relation to drugs, and in the decision letter of the Secretary of State for the reasons she there set out she was of the view that grounds to deport MAM under the Regulations were satisfied.

3. What happened before the First-tier Tribunal is the subject of an agreed witness statement from the Home Office Presenting Officer, Ms Cherreem Lindsay. Ms Dirie, who appears for the respondent before us today and who also appeared at the hearing at the Upper Tribunal, has seen this witness statement and confirmed to us that she was in agreement with it and that it was accurate and it is necessary for me to read out the witness statement. So Ms Lindsay, who is a Presenting Officer within the Home Office, says this:

> "I have been asked to provide information to the Upper Tribunal in respect of the appeal hearing of Mr [MAM] in the First-tier Tribunal at Taylor House on 1 June 2017. I was the Home Office Presenting Officer who presented this appeal before Immigration Judge Cohen. Judge Cohen came into the court and the parties to the appeal were at the back of court. The appellant, his wife and mother-in-law were present, along with the appellant's representative. The parties mentioned above were not called forward by the judge. The judge asked me whether I intended to rely upon the Home Office refusal letter (this being the decision under appeal). I confirmed that I did so intend. None of the witnesses adopted their witness statement. No oral evidence was taken from any person in the appeal. I was not invited by the judge to give any oral submissions, as would be the normal procedure, and I did not give any submissions. The appellant's representative, Ms Dirie, did not give any submissions either. The next thing that happened was that the judge stated that the appeal was allowed. There was one other appeal on the list that day, the appeal of Mr C. Mr C's appeal followed much the same pattern. Mr C's representative was Ms Asanovic of Lamb Building Chambers, London. In the second appeal an interpreter was required but was engaged in another room. The interpreter did not come into Judge Cohen's courtroom at any point. My appeal hearing minute, completed on 2 June 2017, is attached herewith and the Tribunal is respectfully asked to consider it. I confirm that the contents of both my appeal hearing minutes in the appeals of Mr MAM and Mr C respectively were and are an accurate reflection of what occurred in the hearings and were and are true to the best of my knowledge and belief. In the second appeal no oral evidence was taken from any person. The judge did ask Ms Asanovic to leave the courtroom to

clarify a point relating to the Immigration Rules, but again I was not invited to give any submissions and did not give any. In both appeals I wanted to ask questions of the witnesses and wanted to give submissions. For example, I recall that there were discrepancies in the written evidence in Mr [MAM]'s appeal which I wanted to cross-examine him on. By agreeing that I wanted to rely on the refusal letter in Mr [MAM]'s appeal I did not intend to give the impression that I would not make any submissions. With great respect to the learned judge, I feel it was neither correct nor reasonable to take 'relying on the refusal' to mean that there would be no questions or submission from the Home Office. I have carefully read Judge Cohen's Record of Proceedings in the case of Mr [MAM] and would make the following observations. The judge did discuss what he described as the 'high threshold' required in the case at the outset of the hearing but this was the extent of any discussion of the issues. The discussion was directed to the appellant's representative rather than to me. To the extent that the judge's Record of Proceedings disagrees with what is set out in this statement it is my respectful belief that the Record of Proceedings is wrong",

and then her minutes that she refers to is in the following terms:

"Full hearing before Judge M Cohen at Taylor House on 1 June 2017. The appellant was legally represented by Counsel Ms B Asanovic. The appellant was in attendance along with his wife Mrs B. No examination-in-chief or cross-examination was conducted. An Urdu interpreter was booked for this hearing but when the judge enquired it appears the interpreter was in another court. The judge first enquired with Ms Asanovic whether 276ADE in relation to twenty years is at date of application or hearing when all the parties from hearing list were present before him. Counsel was not certain. Judge then enquired with PO and PO stated date of application. Judge asked Ms Asanovic to go away and check. When Counsel returned the judge asked about EX.1 pertaining the appellant's wife's British child H C. Counsel stated that the appellant's wife and her other son H have been granted discretionary leave in the UK because of her parental relationship with the child. Counsel went on today [sic] that the appellant does not meet the Rules and that it would be Article 8 outside the Rules. The judge simply stated without any oral evidence from the appellant he is allowing the appeal."

4. The record of the judge to which reference has been made is in the following terms. This is the judge's observations, 28 September:

"The issues were agreed to be narrow. In the light of my thoughts on the case, it was agreed with the parties that we would proceed on the basis that the witness statements would be adopted into the record, I would hear brief submissions and Ms Lindsay was merely relying upon the Reasons for Refusal Letter. My note on the ROP was intended to indicate that it has been agreed that the witness statements were adopted without the necessity of the appellant and his wife giving

evidence. From the grounds of appeal it appears they may have been a misapprehension in respect of the manner in which we were proceeding."

5. In granting permission to appeal the Judge of the First-tier Tribunal said this:

> "It is submitted that in paragraphs 13 to 15 of the Decision and Reasons that the judge heard written and oral evidence from the appellant, his sponsor and his sponsor's mother before paragraph 16 which refers to the Presenting Officer relying in submissions on the refusal letter only. It is further submitted that the Presenting Officer's Record of Proceedings shows that no oral evidence was taken including evidence-in-chief and as such there could be no cross-examination. The evidence was not tested. It is arguable that there is a procedural irregularity and conflict between the Decision and Reasons and the Presenting Officer's Record of Proceedings and what weight could be placed on witness statements and oral evidence to allow the appeal."

6. Turning to the Decision and Reasons, it is notable that at paragraph 13 the judge said this:

> "13. I heard oral evidence from the appellant in English. He adopted his witness statements as part of his evidence-in-chief. He relied on the documentary evidence and letters submitted in support of this appeal.
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> 14. I then heard oral evidence from the sponsor who gave evidence before me in English. She adopted the witness statements as part of her evidence-in-chief. She relied on documentary evidence submitted in support of the appeal.
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> 15. Finally, I heard oral evidence from the sponsor's mother who adopted her statements in support of the appeal.
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> 16. I then heard submissions from both parties. Ms Lindsay merely relied upon the Reasons for Refusal Letter."

Analysis

7. It is apparent to us that something went seriously wrong before the judge as to how this hearing was to be conducted. We are unable to reconcile what the judge said in his reasons for his decision with the agreed evidence between both sides as to what happened at the hearing. We acknowledge that proceedings before the First-tier Tribunal have a degree of flexibility about them in the way in which evidence can be presented but nonetheless there does have to be, it seems to us, a degree of formality and that where written evidence is to be adopted and relied upon then there has to be a formal process by which that is gone through so that it is clear that it is the witness statement which is the oral evidence

and an opportunity has to be given for whichever party it is to say "I do not wish to cross-examine because I accept the truth of the witness statement" or for that party to say "I wish to cross-examine", and in all cases parties have to be given suitable opportunities at the relevant times to make submissions on the merits of their case and the demerits as they see them of the opposing party's case. In other words, there has to be a formal process.

8. It seems to us on the basis of the agreed evidence, which is what we have to proceed on, that this hearing miscarried in the sense that, for reasons we are unable to define, the judge simply proceeded to determine the case on the basis of the papers even though the Home Office representative wanted to cross-examine and wanted to make submissions. It is unclear to us why the Presenting Officer did not make clear before the First-tier Judge that she wanted to make submissions and that she wanted to cross-examine. The role of any advocate before a court is to represent their party's position and if they see that a judge may be going wrong or has gone wrong their duty there and then is to correct matters rather than waiting for the hearing to conclude and then mount an appeal to this Tribunal or to an Appellate Court with all the resource implications that that has when the matter could be dealt with there and then and we do not know because Ms Lindsay in her witness statement does not explain why she did not say to the judge "I am sorry judge, there is obviously some misunderstanding. I do want to cross-examine. I accept the evidence is to be adopted but I do wish to cross-examine", and why she did not say "I do wish to make submissions, not just rely on the refusal letter".

9. It is with very considerable regret that we have come to the conclusion that we have to remit this matter for a new hearing before a different First-tier Tribunal Judge. It seems to us that the judge's determination cannot stand. He made his determination declaring himself to have heard submissions which he did not hear, accepting the agreed evidence that is before us and he said he made his decision having heard oral evidence which he did not have, even allowing oral evidence, even giving oral evidence the meaning of somebody simply adopting the witness statement, that simply did not happen.

10. For those reasons it seems to us that there was a fatal error in procedure. There was a fatal error in how the hearing ought to have been conducted such that we must remit the matter for a rehearing before a different First-tier Tribunal Judge.

11. We considered whether we ought to remake the decision ourselves and it seems to us this is not the sort of case in which we can do that. The relevant guidance indicates that where there has been a fundamental failure in fairness in that the parties did not have the opportunity to present their case then it is not appropriate for this Tribunal to remake a decision for itself although this Tribunal does try to do that where it can but this is not a case, for the reasons that I have explained, where we can do that.

12. We therefore allow the appeal and we quash the decision of the First-tier Tribunal Judge allowing the respondent's appeal against the Secretary of State's decision to deport him and the matter will be reheard before a First-tier Tribunal Judge.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. The appeal is remitted to the First-tier Tribunal for a fresh decision on all issues.

3. The appeal must not be before FtTJ Cohen

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 16 February 2018

Upper Tribunal Judge Rintoul