Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08022/2017**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 22nd January 2018	**On: 19th February 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ALLAHBAKSH FAKRUSAB NADAF
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: No appearance[1]

DETERMINATION AND REASONS

1. The Appellant is a national of India born on the 4th June 1985. He appeals with permission the decision of the First-tier Tribunal (Judge Hemborough) to dismiss his appeal, on human rights grounds, against a decision to deport him from the United Kingdom.

2. In respect of the decision to deport the salient facts are these. The Appellant was granted indefinite leave to remain in the United

[1] Mr Mills, the Senior Presenting Officer instructed to appear for the Secretary of State for the Home Department fell ill over the weekend preceding this Monday morning hearing and was unable to attend. He requested that the matter be adjourned and in the alternative made submissions in writing.

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Kingdom on the 14th October 2009. On the 25th July 2016 at Aberdeen Sheriff Court he received an 'extended' sentence of 5 years and 3 months imprisonment, having been convicted after trial of three offences against children. These were one offence of sexual assault on a 12 year-old girl by making sexual remarks and touching her vagina through her clothing, and two further separate offences of indecent exposure to children aged 8 and 10, the last offence being committed whilst the Appellant was on bail. The convictions were upheld on appeal in May 2017 but the Scottish Appeal Court did quash the 'extended' element of the sentence.

3. The Respondent served the Appellant with a notification of her intention to deport him on the 25th May 2017 and the Order itself was signed on the 5th June 2017.

4. The Appellant can only succeed in challenging that decision if he can demonstrate that one of the 'exceptions' to deportation set out in s33(2) of the UK Borders Act 2007 applies in his case. He is therefore required to show that he either requires international protection or that his deportation would place the United Kingdom in violation of its obligations under the European Convention on Human Rights. Before the First-tier Tribunal the Appellant sought only to rely on the latter, arguing that his deportation would be a breach of Article 8. The factual basis for that assertion is the fact that the Appellant is the natural father of a British child, born in August 2013.

5. The Appellant's son, whom I shall refer to as K, lives with his mother in Scotland. Although the Appellant and K's mother are now estranged she had supported him throughout the trial and had brought K to visit his father in prison. Initially these visits were fairly regular but they started to dwindle in November 2016 and by the time of the First-tier Tribunal hearing had stopped altogether. The last visit took place in January or February 2017 but the Appellant has continued to speak with him on the telephone. K's mother is now living with a new partner. The Appellant told the First-tier Tribunal that before he had gone to prison he had developed a particularly strong bond with his son, whose mother had worked full time.

6. In order to succeed in his appeal the Appellant needed to show that he had a family life with his son, and that any interference with it would be disproportionate. In order to do the latter he had to prove that it would be "unduly harsh" for his son to have to leave the United Kingdom with him, *and* that it would be "unduly harsh" for his son to remain in the United Kingdom whilst the Appellant was deported to India. If he could not meet both of those tests he would have to demonstrate that there were otherwise 'exceptional circumstances' such that his deportation would be in violation of the terms of the Convention.

7. The Appellant attended his First-tier Tribunal hearing without

representation. The determination records that at the outset of the hearing "it emerged" that the Appellant had not seen the Respondent's bundle. One had apparently been sent to the solicitors who at one time had been representing him, and many of the documents therein had been submitted by the Appellant himself, but the Judge acknowledged that the Appellant may not have had an opportunity to consider the "social and pre-sentence" reports (I take this to be a reference to the Pre-Sentence Report, in Scotland prepared by social services as opposed to a probation officer). The Tribunal therefore provided the Appellant with a short adjournment so that he could read the bundle. Upon resumption of the hearing the Appellant indicated that he was content to proceed. He gave evidence and was questioned by the Home Office Presenting Officer (HOPO). At the close of evidence the HOPO made her submissions which were summarised, for the benefit of the Appellant, by the Tribunal. The Appellant made "observations" on the points raised by the HOPO and the Tribunal reserved its decision.

8. The determination was promulgated on the 24th August 2017. The Tribunal dismissed the appeal. Although it accepted that there was a family life between the Appellant and his son, and that it would be unduly harsh for him to live in India (and thereby be separated from his mother and extended maternal family in Scotland), the Tribunal could not be satisfied in respect of the final test, namely that it would be "unduly harsh" to expect K to remain with his mother in the United Kingdom.

9. The Appellant drafted his own grounds of appeal. They are in essence that the hearing before the First-tier Tribunal was unfair. He submits that the Tribunal should, of its own motion, considered whether to adjourn the proceedings so that the Appellant could obtain legal advice. He now realises that he should have applied for such an adjournment himself. He did not understand that this was an option open to him, or how the court process works. He was not given sufficient time to read and understand the Respondent's bundle.

10. Permission was granted on the 15th September 2017 by First-tier Tribunal Judge EM Simpson who was satisfied that the decision to proceed with the appeal was arguably contrary to Rule 2 of the Tribunal Procedure Rules 2014 which provides that the overriding objective is for the case to be determined fairly and justly. Judge Simpson was particularly concerned because the case involved the fundamental human rights of a young child: she considered it arguable that in those circumstances the importance of the objective was "heightened".

Discussion and Findings

11. The grounds raise two related issues relating to fairness. The first

is whether the Appellant was properly equipped to represent himself in such a case and whether consideration should have been given to adjourning to enable him to get legal advice and representation. The second was whether, in its conduct of the hearing, the Tribunal acted fairly in giving the Appellant an appropriate level of assistance so that he could properly present his case; the specific issue arising being whether the Appellant was given sufficient time to read and understand the documents in the Respondent's bundle. As I explained to the Appellant, in these proceedings the burden lies on him to establish not just that the First-tier Tribunal erred in its approach, but that any error is such that the decision should be set aside.

12. As is customary in appeals involving allegations of unfair trial, the First-tier Tribunal Judge in question has been invited by the Upper Tribunal to comment on the allegations made in the grounds. In this case Judge Hemborough has done so. His response was as follows:

> "I have a good recall of this appeal and you will see that there is a full note of what transpired at the hearing in my record of proceedings which I ask you to read.
>
> This was a detained case. The Appellant was unrepresented. At the outset I undertook the usual introductions and explained the purpose of the proceedings, my independence etc.
>
> Although the Appellant is an Indian national he had been in the UK for 10 years and spoke English fluently with a Scottish accent. He said that had been legally represented whilst living in Scotland and that on being transferred to Harmondsworth, presumably in anticipation of his removal, he had consulted 2 different firms both of whom had told him that legal aid was not available and that he had no means to pay for representation. I explained to him that legal aid was subject to a merits test and that it was not unusual for unrepresented Appellants to appear in this jurisdiction and I that I would assist him in bringing out the merits of his appeal. I refer to page 2 of my record "We will explore".
>
> In accordance with my usual practice I went through the papers explaining what documents I had considered and asked him whether he wished to submit anything else. It then emerged that he had not seen the Respondent's bundle. It had been sent to his Scottish solicitors. As you will see from my record and my decision the Respondent's bundle essentially comprised documents submitted by the Appellant and his representatives many of which were duplicated in the Appellant's own bundle, the main exceptions being the trial judge's sentencing remarks and the pre-sentence report. Whilst I was of the view that he would have been aware of the content of both documents I adjourned for 15 minutes in order that he could re-familiarise himself with these documents in order that we could engage in a meaningful discussion about what was said in them. I see that page 1 of my note says "has seen everything else."
>
> On the resumption he said that he had read the documents and was ready to proceed. He did not ask for an adjournment and I did not offer one. Frankly I did not see any point an adjourning given that he had been unable to procure legal representation hitherto and was unlikely to be able to do so if the case was adjourned. In reality this was a submissions case where I considered I was perfectly capable of exploring all of the points which might

> be taken in the Appellant's favour which is what I did in the course of the hearing which lasted an hour and a half minus the 15 minute break. The duration is recorded in my note.
>
> Permission to appeal has been granted and you have asked me not to comment upon the merits of the challenge being presented. All I will say is that I considered at the time that I acted fairly in conducting the hearing in the manner described and I remain of that view."

13. Prior to calling the appeal on I ensured that a copy of these comments was made available to the Appellant, and informed him that I would not begin the hearing until he had time to read them. I received a call from the cells approximately half an hour after the papers were sent down informing me that the Appellant was ready to proceed.

Representation

14. As can be seen from the foregoing the Appellant was not always unrepresented. At the date that the Respondent first notified him of her intention to deport the Appellant was represented by a firm of solicitors in Aberdeen called George Mathers & Co. This firm had in fact made some submissions on his behalf in response to that notification, but had ceased to act sometime in 2017 when the Appellant had been transferred to immigration detention in England. I can see from the Record of Proceedings, and indeed Judge Hemborough's note, that the Appellant told the First-tier Tribunal that he had made attempts to get new representatives after that move. As he explained to me, he had wanted to get specialist immigration solicitors – George Mathers & Co were criminal practitioners.

15. The determination is silent as to why the matter was not adjourned to enable the Appellant to try and instruct new solicitors. Since the Appellant did not apply for an adjournment that is perhaps unsurprising. Judge Hemborough's reasoning in not adjourning the matter of his own motion is set out in his response above. He did not see the point, since it did not appear on the facts that there was any realistic prospect of the Appellant managing to find new representatives. He had already been turned down by two firms at that point. At the hearing before me the Appellant confirmed that to be the case, and produced a list of firms that he had contacted, all of whom had declined to take the case on. The list comprised five well-known specialist immigration practices and 'BID'. The Appellant states that he has also called other firms but these are the ones that he can remember speaking to.

16. I share Judge EM Simpson's concern that in a case involving the separation of a British child from his father it would be preferable for the Tribunal to have the benefit of specialist legal submissions. I am unable to conclude on the facts of this case, however, that the lack of representation was a matter which should have led to the matter

being adjourned, or that the Tribunal could have done anything to influence the Appellant's ability to find new solicitors. The reasons that he was not represented is because, as he candidly acknowledged before me, twofold. He is without funds and lacks the means to get funds; he has been told that his case does not qualify for legal aid. As the Appellant's latest list of rejections illustrates, Judge Hemborough was quite right when he concluded that there was no point in adjourning. The Appellant was very unlikely to be able to persuade anyone to take on his case. Adjourning the matter would not have progressed his position at all; it would simply have meant that he spent even longer in detention before appearing unrepresented in his appeal.

Assistance

17. In general terms I am quite satisfied that Judge Hemborough acted appropriately towards this unrepresented Appellant. As his note makes clear, he was plainly aware that the Appellant might face difficulties in presenting his case and he accordingly made allowances for that, for instance explaining matters to the Appellant and, as he puts it "exploring all of the points which might be taken in the Appellant's favour". Before me the Appellant did not contend otherwise.

18. Dealing with the specific issue of the belatedly served Respondent's bundle I note that the Appellant was given approximately 15 minutes to read the bundle. This is referred to in the determination as follows:

> "It emerged that he had not seen a copy of the Respondent's bundle. Although [HOPO] Ms Hunjan confirmed that a copy had been sent to the solicitors who had been advising him in Scotland. I observed that the key documents in the bundle had either been submitted by the Appellant and he would thus have knowledge of their content, or when mirrored by documentation in his own bundle. I noted however that he may not have seen, or at least considered recently, the social and pre-sentence reports. I therefore provided him with a copy of the bundle and adjourned the hearing for a short period whilst he re-familiarised himself with the content of those documents".

19. Before me the Appellant acknowledged that this was correct. The Judge had given him a copy and given him some time to read it. The bundle contains:

i) Copy of the Appellant's Indian passport

ii) The Pre-Sentence report

iii) The Judge's sentencing remarks

iv) Notice of liability to deportation dated 10th August 2016

v) Representations dated 12th August 2016 sent on the Appellant's instructions by George Mathers & Co Solicitors, and a further letter from the same firm with various enclosures, dated the 19th August 2016

vi) Various items of documentary evidence establishing that prior to his sentencing the Appellant had lived in the family home, including council tax bills, HMRC correspondence and utility bills

vii) The certificate of marriage between the Appellant and K's mother

viii) A letter dated 13th August 2016 said to be from K's mother, in which she confirmed that prior to going to prison the Appellant was the main carer. She wrote that the Appellant continues to have regular contact with his son and that it would be "detrimental to us as a family" should the Appellant be deported. She states that it is their hope to be reunited as a family once he is released from prison.

ix) K's birth certificate

x) Various education certificates relating to the Appellant

xi) The Judgement of Lord Carloway, Lord Justice General in the Appeal Court in Edinburgh on the 25th May 2017 in respect of the Appellant's appeal against his conviction and sentence

xii) The Respondent's reasoned decision on deportation

20. The Appellant confirmed to me that of these documents the only ones with which he was not entirely familiar prior to the First-tier Tribunal hearing were items (ii) and (iii), those being the social worker's (probation) report and the sentencing remarks. Obviously he had seen the social worker's report before, but had not read it for some time. He had directly heard the sentencing remarks from the trial judge but had not had time to read and process them. He was very familiar with items (i), (vi), (vii) (ix) and (x), because they were all documents that he had sent to the Home Office himself, and had indeed replicated in his own bundle. Items (iv), (xi) and (xii) were also known to him. His difficulty, as he put it, is that he was given the bundle and time to read but he did not know what documents might have been relevant and which ones were not. It ended up with him

not reading anything because he did not know where to start.

21. I have considerable sympathy for the Appellant. I accept what he told me about his confusion and inability to mentally process the documents in the Respondent's bundle. I have considered carefully whether those matters put him at such a disadvantage in presenting his case as to render this determination unsafe. I have to conclude that they did not. The fact that the Appellant had been convicted was not in issue. That was the factual basis for the decision to deport. To that extent the sentencing remarks and pre-sentence report were of very limited significance. The only way that the Appellant could succeed in his appeal was by showing that it would be "unduly harsh" for his son to remain in this country without him. Neither of those documents were of any assistance to him in that regard and there is nothing sensible he could have said about those documents that might have affected that outcome. I am quite satisfied that in approaching this appeal the First-tier Tribunal kept in mind the fact that the Appellant was unrepresented and that it took care to focus on any aspects of the evidence that might have assisted the Appellant.

22. Unrepresented litigants and appellants now appear with daily frequency in courts and tribunals all over the country. There will be cases, perhaps many cases, where their lack of professional representation puts them at such a profound disadvantage that it will be necessary to adjourn. This however was not one of those cases. There was, first, no realistic prospect of the Appellant managing to secure the services of a solicitor. Second, and more importantly, this was not a case involving complex legal argument. The Tribunal was faced with a simple question of fact: what would the impact of the Appellant's removal be on his son? As the Appellant candidly explained, he had not seen his son for some time. His former partner, the child's mother, had been bringing him to prison but these visits had dwindled and, as the Appellant acknowledges, she does not appear to be interested in maintaining K's relationship with his father. Before me the Appellant said that even telephone contact, facilitated by K's maternal grandmother, was now intermittent. The boy was living with his mother and her new partner and it is difficult to foresee that any meaningful contact will be resumed. Those were the facts that the Tribunal was required to weigh in the balance against the strong public interest in deportation. I am not satisfied that a professional immigration practitioner could have persuaded the Tribunal to take any view other than the one that it very fairly reached. Whilst it would be "unduly harsh" to expect K to go to India with his father, it was not, in all the circumstances, unduly harsh for him to remain in Scotland with his mother.

Decisions and Directions

23. The decision of the First-tier Tribunal is not flawed for legal error and is upheld.

24. There is no order for anonymity.

Upper Tribunal Judge Bruce
8.2.18