Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09373/2019_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 11 November 2020

Decision & Reasons Promulgated:
On 16 November 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between

A C
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or his minor daughter. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

This is a decision on the papers without a hearing. The appellant sought an oral hearing. The respondent did not object. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 9-14 below. The order made is set out at para 29 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):
For the appellant: [no written submissions]
For the respondent: Mr E Tufan, Senior Presenting Officer.

DECISION

1. The appellant, a national of Bangladesh born on 6 September 1962, appeals against a decision of Judge of the First-tier Tribunal M A Khan (hereafter the "Judge") who, in a decision promulgated on 4 September 2019 following a hearing on 8 August 2019, dismissed his appeal on human rights grounds (Article 8) against a decision of the respondent of 15 April 2019 (not 10 April 2018, as stated at para 1 of the Judge's decision) to refuse his representations on human rights grounds made in response to a notification by the respondent that she was seeking to deport him as a foreign criminal. As the index offences were offences for which the appellant was sentenced to 21 months' and 14 months' imprisonment (concurrent), he was a "medium offender" as explained by the Court of Appeal in NA (Pakistan) and others v SSHD [2016] EWCA Civ 662.

2. On 13 May 2020, the Upper Tribunal issued directions to the parties seeking submissions on whether it would be appropriate in the instant case to decide the following questions without a hearing:

   (a) whether the decision of the Judge involved the making of an error of law; and

   (b) if so, whether it should be set aside.

3. On 5 August 2020, the Upper Tribunal again issued directions to the parties.

4. In response to the two sets of directions, the Upper Tribunal has received the following:

   (i) on the appellant's behalf, a document entitled: "*Submissions following Covid-19 directions*" by Mr M Symes, of Counsel, instructed by Lawmatic Solicitors, submitted under cover of a letter dated 28 May 2020 and emailed to the Upper Tribunal on 28 May 2020, timed at 17:48; and

   (ii) on the respondent's behalf, a document entitled: "*SSHD's response to Directions*" dated 13 August 2020 by Mr Tufan submitted by email dated 13 August 2020 timed at 15:31 hours.

The issues

5. I have to decide the following issues (hereafter the "*Issues"*),

   (i) whether it is appropriate to decide the following questions without a hearing:

      (a) whether the decision of the Judge involved the making of an error on a point of law; and

      (b) if yes, whether the Judge's decision should be set aside.

(ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

6. At para 2 of his written submissions, Mr Symes stated that the appellant sought an oral hearing.

7. At para 9 of his submissions, Mr Tufan stated that, in the respondent's view, an oral hearing was not necessary.

8. I have considered the circumstances for myself.

9. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.

10. The appeal in the instant case is straightforward. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. This appeal relates to the protected human rights of the appellant and members of his family, including his minor daughter. These are matters of some seriousness as the outcome will have considerable impact upon all of them.

11. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*". However, having considered the Judge's decision, the grounds and the parties' submissions, I concluded that the Judge did materially err in law, that his decision should be set aside and that the appeal should be remitted to the First-tier Tribunal. Accordingly, there is no prejudice to the appellant by my proceeding to decide the Issues without a hearing notwithstanding that he requests an oral hearing.

12. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases. Of course, the need to be fair cannot be sacrificed.

13. There are cases that can fairly be decided without a hearing. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.

14. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

Questions (a) and (b) - whether the Judge erred in law and whether his decision should be set aside

15. Mr Tufan correctly states in his submissions that, as Leggatt LJ said in CI (Nigeria) [2019] EWCA Civ 2027, it is unnecessary for a Tribunal or Court to refer to paras 398-399A of the Immigration Rules. Nevertheless, it is a concern in the instant case that the Judge, in setting out the provisions of paras 399 and 399A of the Immigration Rules at paras 8-9 of his decision, set out provisions which are obsolete. For example, para 8.a.(a) of the Judge's decision refers to the test of whether it would be reasonable for a qualifying child to leave the United Kingdom and para 9.2 to whether the appellant is able to show that "*he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK*".

16. This is relevant in deciding whether the appellant has had a fair hearing when considered in conjunction with the errors of law set out below that I am satisfied he did make.

17. In his written submissions, Mr Tufan accepted that there were errors of law in the Judge's decision. He drew attention to the fact that the Judge referred to Masih (Deportation -public interest - basic principles) [2010] UKUT 00046 (IAC) and the fact that there have been further developments in case law since Masih, none of which were considered by the Judge. As Mr Symes submitted at para 19 of his written submissions, Masih pre-dated the reformulation of human rights in the Immigration Rules with effect from July 2012.

18. The mere fact that a judge does not refer to recent case-law does not mean that he failed to apply relevant principles. However, in the instant case, the Judge said at paras 43 and 44 as follows:

> "43. The appellant committed a serious fraud and theft offences against an old, sick and vulnerable made [sic], for which he shows no remorse whatsoever.
>
> 44. I have considered all aspects of 2014 Act in coming to my decision and find that the appellant does not have any qualifying aspects under any of the sub-sections for this legislation. In the circumstances I find that the respondent's decision is wholly proportionate to deport this appellant to Bangladesh".

19. Given that the Judge did not set out a version of para 398 that referred to the test of whether there are very compelling circumstances over and above the exceptions and that he did not consider whether there were such very compelling circumstances, his reasoning at para 43 of his decision must relate to his findings concerning the exception(s) he did consider, i.e. his finding at para 40 that:

> "… it will bot *[sic]* be dully *[sic]* harsh for [the appellant's wife and minor daughter] to continue to reside in the UK in absence of the appellant".

20. If this is right, then it follows that the Judge erred in law by taking into account (at para 43) the seriousness of the appellant's offences in deciding whether it would be unduly harsh for the appellant and his minor daughter to live in the United Kingdom without the appellant, contrary to the judgment of the Supreme Court in KO (Nigeria) & Others v SSHD [2018] UKSC 53.

21. The Judge appeared not to be aware that, in the case of a medium offender who fails to satisfy the exceptions, it is necessary to consider whether there are very compelling circumstances over and above the exceptions. He failed to consider this

issue, making no reference at all to it in his decision. This fact, taken together with the fact that he referred to Masih, which was decided before the amendments to the Immigration Rules in July 2012, and that he said at para 44 that he found the respondent's decision to "*wholly proportionate*", demonstrates that he had in mind, and applied, obsolete principles.

22. Whilst para 8.a.(a) of the Judge's decision referred to the test of whether it was reasonable for a qualifying child to leave the United Kingdom, the Judge said, at para 40, that *"… it will bot [sic] be dully [sic] harsh for them to continue to reside in the UK in absence of the appellant".* The decision is therefore confused. It is difficult to be confident that he was aware of and applied the correct test, that is, whether:

> "(a) it would be unduly harsh for the [qualifying child/partner] to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the [qualifying child/partner] to remain in the UK without the person who is to be deported;"

23. In his written submissions, Mr Tufan accepted that the Judge gave insufficient consideration to the medical evidence concerning the appellant's minor daughter. Having considered paras 12-16 of the written submissions of Mr Symes, I entirely agree.

24. I am satisfied that the Judge erred in law in each of the ways that I have identified above. Furthermore, given that he plainly applied obsolete principles, an obsolete version of the Immigration Rules, referred to case-law that was decided before the fundamental amendments made to the Immigration Rules with effect from July 2012, failed to demonstrate that he was aware of and had applied the guidance in KO (Nigeria), I am driven to conclude that the appellant simply has not had a fair hearing of his case.

25. For all of the above reasons, I set aside the decision of the Judge to dismiss the appeal. His summary of the evidence he heard, at paras 23-30 of his decision, shall stand as a record of the evidence given to the First-tier Tribunal.

26. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

27. In my judgement, this case plainly falls within both para 7.2 (a) and (b). Accordingly, the appropriate course of action is to remit this appeal to the First-tier Tribunal for that Tribunal to re-make the decision on the appellant's appeal.

28. The Judge made an anonymity order. He did not explain his reasons. It is not evident from the material before me that an anonymity order is appropriate in the instant case. The principle of open justice is an important one. The appellant's minor daughter can be referred to by means of an acronym. The appellant's medical condition does not appear to warrant an anonymity order. I have maintained the anonymity order pending submissions on the point. The appellant will be expected to explain at the next hearing in the First-tier Tribunal why an anonymity order is necessary.

Notice of Decision

29. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety. This appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal M A Khan.

Signed Date: 11 November 2020

Upper Tribunal Judge Gill

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email