Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05912/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Teams*	**Decision & Reasons Promulgated**
On 28 January 2022	**On 10 February 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

DHRUV NARESH VIKAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the appellant: Mr. D Lemer, Counsel, instructed by Duncan Lewis Solicitors
For the respondent: Ms. A Ahmed, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of Judge of the First-tier Tribunal Bartlett ('the Judge') sent to the parties on 10 February 2021 by which the appellant's appeal against the decision of the respondent to refuse to grant him entry clearance was dismissed.

2. Upper Tribunal Judge Norton-Taylor granted the appellant permission to appeal on the sole ground raised namely that the decision of the First-tier Tribunal to deny the appellant the opportunity to present oral evidence at his appeal hearing was unlawful.

3. Ms. Ahmed confirmed at the outset of the hearing that the respondent accepted the decision of the Judge was unsustainable for material error of law. For the reasons detailed below, she was correct to adopt such position.

Remote Hearing

4. The hearing before me was a Teams video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle was secured; that no party was prejudiced; and that, insofar as there was any restriction on a right or interest, it was justified as necessary and proportionate.

Background

5. The appellant is a citizen of India. He is the legal guardian of a child relative who resides in the United Kingdom and sought entry to join the child in this country. By a decision dated 10 September 2019 the respondent concluded that the appellant did not meet the eligibility relationship requirements of paragraphs E-ECDR.2.2 to 2.5 of Appendix FM of the Immigration Rules, nor the financial requirements established by paragraphs E-ECDR.3.1. to 3.2.

6. The respondent further concluded that no exceptional circumstances arose that would render refusal a breach of article 8 ECHR. Nor did the application fall for a grant of entry clearance outside the Immigration Rules because of compassionate factors.

7. The appellant appealed the respondent's decision, and his appeal was heard by the Judge at a remote CVP hearing held at Taylor House on 28 January 2021. In respect of the decision not to permit the appellant the opportunity to give oral evidence, the Judge confirmed at [2] of her decision:

> "2. The hearing was carried out via CVP. Near the start of the hearing, I asked if the appellant, who was visible at the hearing, was participating from outside the United Kingdom. Mr. Pipe confirmed that he was. It is regrettable that this was not raised by representatives as a preliminary issue or even at the hearing until I made inquiries. I stated that in accordance with Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) the appellant would not be permitted to give evidence. Mr. Pipe referred me to the Court of Appeal case of FB (Afghanistan) v. Secretary of State for the Home Department [2020] EWCA Civ

1338 (21 October 2020) which he considered enabled the appellant to give evidence from another country. I could not accept this submission and the appellant was not permitted to give evidence at the hearing.'

Decision

8. I am satisfied that the appellant's legal representatives did not have the guidance provided by the Tribunal in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC), identified as minimum requirements, at the forefront of their minds:

> '21. ...
>
> a. A party seeking to call evidence at an oral hearing by electronic link must notify all other parties and the Tribunal at the earliest possible stage, indicating (by way of witness statement) the content of the proposed evidence. (If the evidence is uncontested, an indication of that from the other parties may enable the witness' evidence to be taken wholly in writing.)
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> b. An application to call evidence by electronic link must be made in sufficient time before the hearing to allow it to be dealt with properly. The application should be made to the relevant judge (normally the Resident Senior Immigration Judge) at the hearing centre at which the hearing is to take place, and must give (i) the reason why the proposed witness cannot attend the hearing; (ii) an indication of what arrangements have been made provisionally at the distant site (iii) an undertaking to be responsible for any expenses incurred.
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> c. The expectation ought to be that the distant site will be a court or Tribunal hearing centre, and that the giving of the evidence will be subject to on-site supervision by court or Tribunal staff.
>
> d. If the proposal is to give evidence from abroad, the party seeking permission must be in a position to inform the Tribunal that the relevant foreign government raises no objection to live evidence being given from within its jurisdiction, to a Tribunal or court in the United Kingdom. The vast majority of countries with which immigration appeals (even asylum appeals) are concerned are countries with which the United Kingdom has friendly diplomatic relations, and it is not for an immigration judge to interfere with those relations by not ensuring that enquiries of this sort have been made, and that the outcome was positive. Enquiries of this nature may be addressed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division). If evidence is given from abroad, a British Embassy, High Commission or Commonwealth may be able to provide suitable facilities.
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> e. The application must be served on all other parties, in time for them to have a proper opportunity to respond to it.

f. The decision whether to grant the application is a judicial one. The judge making the decision will take into account the reasons supporting the application, any response from other parties and the content of the proposed evidence, as well as of the overriding objective of the rules. If the application is granted, there may be further specific directions, which must be followed.

g. If there is a direction for the taking of evidence by electronic link, the Tribunal will nevertheless need to be satisfied that arrangements at the distant end are, and remain, appropriate for the giving of evidence. A video link, if available, is more likely to be suitable than a telephone link. The person presiding over the Tribunal hearing must be able to be satisfied that events at the distant site are, so far as may be, within the observation and control of the Tribunal, and that there is no reason to fear any irregularity.

h. There will need to be arrangements to ensure that all parties at the hearing, as well as the judge, have equal access to the input from the electronic link. Particular attention needs to be given to the accommodation of any interpreter.

i. In assessing any challenged evidence, the Tribunal may have to bear in mind any disadvantages arising from the fact that it was given by electronic link, and should be ready to hear and consider submissions on that issue. …'

9. The appellant's legal representatives appear to have relied upon the remote listing of the hearing during the pandemic as sufficient to permit the applicant to present oral evidence by electronic link. Confirmation that the appellant was to give such evidence from his home in India was first conveyed to the First-tier Tribunal by counsel's skeleton argument, which was plainly insufficient to satisfy the minimum requirement that the First-tier Tribunal be informed at an early stage of the appellant's wish to give evidence from abroad.

10. I have no doubt that experienced counsel, not Mr. Lemer, sought to ameliorate the failing by means of his skeleton argument where he expressly relied upon the observation of the Lord Chief Justice in *FB (Afghanistan) v. Secretary of State for the Home Department* [2020] EWCA Civ 1338, [2021] 3 All E.R. 424, at [198]:

'198. The practical consequences of having to pursue an appeal from abroad were considered by Lord Wilson beginning at [60] of his judgment (three other members of the court agreed with his reasoning). It was an appeal heard in February 2017 in the Supreme Court and in September 2015 in the Court of Appeal. It considered the practical and technological arrangements available at that time. Even so, as Lord Wilson explained at [67] in connection with giving evidence from abroad, "it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant's opportunity to give evidence

> in that way is open to him." The focus was on giving oral evidence. Plainly, that will rarely be a consideration in judicial review claims. The consideration of the practicalities that followed were rooted in the technology available to and used both by the First-tier Tribunal and appellants. In the intervening years both have been transformed and their use has become ubiquitous in courts and tribunals the world over, a process accelerated by the effects of the Covid 19 pandemic which has swept around the globe since the beginning of this year. Lord Wilson discussed the cost of hiring video conference rooms and equipment, for example, which have long ago become an irrelevance in holding online video meetings. From the point of view of a litigant, whether discussing a case with legal representatives, attending a hearing or giving evidence all that is required is video enabled device attached to the internet, with widely available commercial software installed in it. The position in courts and tribunals is entirely different from how it was even three or four years ago.'

11. There remained a clear difficulty for the appellant when his appeal was called on before the Judge, namely his inability to confirm that the Indian authorities raised no objection to live evidence being given to the Tribunal from within its jurisdiction. In the circumstances, it is unsurprising that the Judge turned her attention to the guidance in *Nare*.

12. However, as confirmed by the Tribunal in *Nare*, and affirmed by *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC), the decision whether to allow evidence to be given by electronic means is a judicial one, requiring consideration of the need to do so, the arrangements at the distant site, and the ability to assess such evidence, by reference to guidance. In this matter, the Judge provided no reasoning as to why the appellant was not permitted to give evidence in his own appeal beyond a bald assertion that her decision was in 'accordance' with the decision in *Nare*.

13. I am satisfied that the failure of the Judge to provide any reasons as to why she could not 'accept' the submission advanced by counsel on behalf of the appellant was unfair and so unlawful. In reaching this conclusion, I observe that the consequence of the Judge's decision was that the appellant could not give oral evidence at his own hearing, which he was attending. The submission advanced on his behalf may ultimately have not withstood judicial scrutiny, but he could properly expect to be provided adequate reasons for its rejection. Whilst there is no general common law duty to give reasons, it is well-established that adequate and intelligible reasons should be given for judicial decisions. I am satisfied that the barring of a party from giving oral evidence in circumstances where they asserted reliance upon Court of Appeal authority said to dilute previously identified minimum requirements required adequate reasoning as a matter of basic fairness.

14. My conclusion as to fairness is further supported by consideration of the record of proceedings. The Judge notes that she informed counsel at the hearing that consequent to the decision in *Nare* she could not hear oral

evidence from the appellant as he was overseas. Counsel submitted that the Court of Appeal judgment in *FB (Afghanistan)* "changes the landscape" and that the position had also changed following the consideration of *Nare* in *R (Kiarie) v. Secretary of State for the Home Department* [2017] UKSC 42. The record then proceeds to simply record that the Judge considered herself bound by *Nare,* with no further reasoning. The appellant was therefore not provided with adequate reasons as to why his submission based upon the judgment in *FB (Afghanistan)* was rejected either at the hearing or in the subsequent written decision. I conclude that such failure is a material error of law.

Remaking the Decision

15. The representatives agreed that as the appellant had not enjoyed a fair hearing before the First-tier Tribunal this matter should be remitted to the First-tier Tribunal. I agree.

16. The First-tier Tribunal can properly expect the appellant to act in accordance with the recent guidance as to the provision of oral evidence from abroad provided by the Upper Tribunal in *Agbabiaka*.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 10 February 2021 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

18. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge sitting at the First-tier Tribunal at Taylor House other than Judge of the First-tier Tribunal Bartlett.

19. No findings of fact are preserved.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 28 January 2022