IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001875
First-tier Tribunal No: HU/02256/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 January 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Cyprian Kumwaka
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: None (Appellant in person)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 15 December 2022

DECISION AND REASONS

1. The appellant, a national of Kenya born on 26 March 1979, appeals against a decision of Judge of the First-tier Tribunal Chana (hereafter the "judge") promulgated on 6 October 2021 following a hearing on 6 August 2021 by which the judge dismissed his appeal on human rights grounds (Article 8) and purportedly under the Immigration Rules against a decision of the respondent of 4 March 2021 to refuse his application of 27 July 20202 for leave to remain in the United Kingdom on the basis of his family and private life. I use the word "*purportedly*" because it is well-known that s.15 of the Immigration Act 2014 abolished, with effect from 20 October 2014,

the right of appeal that existed immediately prior to 20 October 2014 to appeal against a decision on the ground that it is not in accordance with the Immigration Rules. The judge therefore did not have jurisdiction to dismiss the appeal under the Immigration Rules.

2. In relation to the appellant's family life claim, the decision letter states, inter alia, that the respondent accepted that the appellant had a genuine and subsisting relationship with his partner. However, it was considered that there were no insurmountable obstacles to family life between the appellant and his partner being enjoyed outside the UK.

3. The issues before me include whether the appellant had had a fair hearing.

4. The appellant had acted in person before the judge and also in making his application to the First-tier Tribunal ("FtT") for permission to appeal. Judge of the First-tier Tribunal Singer granted permission to appeal. Paras 1 and 3 of his decision, which neatly summarise the appellant's grounds and the context in which the procedural issue of whether the appellant had had a fair hearing arises in this case, read as follows:

> "1. The application, …, argues in the grounds (which are unparticularised) that the Judge materially erred in law by (1) wrongly holding that the Appellant was in the United Kingdom unlawfully and failed to consider relevant evidence regarding his fee waiver applications, (2) acting unfairly by not adjourning the hearing so that the Appellant's partner could give live oral evidence, (3) breaching procedural fairness by proceeding [in] circumstances where the Appellant did not have the Respondent's bundle and had only been notified of the hearing four days prior, and (4) failed to have regard to relevant evidence and had regard to irrelevant matters.
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> 3. In relation to Grounds 2 and 3, it is unclear from the determination whether any formal application was made at the hearing to adjourn by the Appellant. The respondent had previously accepted in the refusal letter that the relationship between the Appellant and his claimed partner was genuine and subsisting (see paragraphs 21 and 30), but was allowed at the hearing to withdraw that concession. Given that the Appellant was [unrepresented], had only received the notice of hearing four days prior (see paragraph 20), and had previously indicated he was not calling his partner (see paragraph 19), who had health issues and vulnerabilities (see paragraphs 14 and 34), it is at the very least arguable that the Judge ought to have gone further than simply allowing the Appellant to address her on the issue (see paragraph 3) and in fact considered whether it was fair to adjourn the hearing in these circumstances to enable the Appellant to either call her to give live evidence or obtain other evidence to deal with the matter which was newly in issue. It is also unclear from the determination whether the Judge satisfied herself that the Appellant was in possession of the Respondent's bundle. She refers to the existence of "generic material served on behalf of the Respondent".

5. At the commencement of the hearing before me, I attempted to establish the stage at which the Presenting Officer who appeared for the respondent before the judge, Mr Bassi, withdrew the respondent's concession that the appellant had a genuine and subsisting relationship with his partner and the reasons why he did so.

6. Mr Melvin informed me that Mr Bassi's minutes on the file do not give any indication concerning the point in time when he withdrew the concession. Mr Bassi's minutes show that he was concerned about three matters as follows:

   (i) that the appellant's partner did not attend the hearing;

   (ii) that there was no witness statement from her; and

   (iii) that the appellant in giving oral evidence before the judge, changed his mind as to where she was on the day of the hearing. Mr Melvin drew my attention to the fact that the appellant was asked where his wife was, and he replied that she was "*at home*". When he was then asked whether it was possible to arrange for her to give evidence by CVP, the appellant said that she was travelling to Devon.

7. As the appellant was present at the hearing before the judge and was in a position to give oral evidence about the matter, I heard oral evidence from him. He gave evidence in the English language which he spoke fluently. He said that Mr Bassi withdrew the concession at the beginning of the hearing. He said that, as the respondent had accepted that his relationship with his partner was genuine and subsisting, he had decided not to call her to give oral evidence. He said that, when the respondent was allowed by the judge to withdraw her concession, he informed the judge that he wished to call his partner to give oral evidence. He told the judge that he could telephone his partner and ask her to give oral evidence or the hearing could be postponed. Mr. Bassi informed the judge that there was no need to postpone the hearing and the judge said that the hearing had to be concluded that day.

8. I asked the appellant why he did not take advantage of the possibility offered to him of his partner giving evidence by CVP when he was asked if she could give evidence by CVP. He said that it was because she was not available. They were at the time in the process of moving to Devon. Prior to the hearing day, he had informed the FtT in writing that he did not intend to call a witness. This was because it was not disputed that his relationship with his partner was genuine. If the respondent had required his partner to attend the hearing, the respondent could have informed him prior to the hearing day. It was challenging for him to arrange for his witness to give evidence.

9. The appellant also said that he was not in possession of the Home Office bundle at the hearing. In addition, he received the Notice of Hearing only four days before the hearing date.

10. Finally, the appellant also took issue with the judge's finding as to his illegal presence in the United Kingdom.

11. Checks by the Upper Tribunal's administrative staff of the FtT's "CCD system" revealed that the CCD system contained all of the documents that one would expect to see for an appeal but not the judge's Record of Proceedings.

12. Mr Melvin informed me that he was not in a position to accept that the appellant had requested an adjournment because Mr Bassi's minutes did not state that the appellant had done so. In addition, Mr Melvin submitted that the fact that the

appellant had been inconsistent in giving his oral evidence about where his partner was on the hearing day, i.e. whether she was at home or travelling to Devon, shows that there was a lack of credibility as to whether his relationship with his partner was genuine.

Assessment

13. I have no hesitation in accepting the appellant's evidence that he had requested the judge to postpone the hearing and in concluding that the hearing before the judge was not a fair hearing. My reasons are as follows:

(i) The decision letter accepted that the appellant had a genuine and subsisting relationship. I accept the appellant's evidence that he informed the FtT prior to the hearing date that he did not intend to call his partner to give evidence. It is not surprising that he made this decision given that the genuineness of the relationship was not in issue. For the same reason, it is not surprising that there was no witness statement from the appellant's partner. By Mr Bassi withdrawing the concession at the hearing, the appellant was effectively ambushed by the respondent's change of position.

(ii) Whilst it may well be that the appellant gave different evidence before the judge when asked why his partner could not attend by CVP, the fact of the matter is that, if the appellant had been legally represented, he would have been entitled to time to arrange for his partner to attend and to obtain a proof of her evidence. In addition, he would have been entitled to have time to consider what other evidence he could adduce to establish that the relationship was genuine. The fact that he was unrepresented before the judge should not prejudice his position. To the contrary, once the concession was withdrawn, the judge was obliged to ensure that the appellant had a fair opportunity to consider what evidence to call and obtain proof of his partner’s evidence if he was going to call her to give evidence. Plainly, the judge did not do so. The fact that she invited him to address her on the issue did not absolve her from her duty to ensure that the hearing was fair, especially given that the appellant was not legally represented.

(iii) Finally, it may be that judges and practitioners, being used to seeing litigants and witnesses give evidence, at times fail to appreciate that the giving of evidence by a lay person may not be a small matter to many people. It is not to be assumed that people can and should stand ready to give evidence at a moment’s notice when asked to do so without the need to consider how they may best present their evidence and to prepare themselves mentally to give oral evidence before a judge. To deny them that opportunity is tantamount to placing undue and unfair pressure not only on them but on the party calling them to give evidence. It is simply unfair to draw an adverse inference as to credibility from the mere fact that an individual may appear hesitant (even if that was the case in the instant case) to call another individual to give evidence without any prior notice at all.

14. For the reasons given above, the judge materially erred in law, in that, she failed to ensure that the appellant had a fair hearing. In the circumstances of the instant case, she ought to have adjourned the hearing. Her failure to do so means that the hearing

before her is vitiated by a serious procedural error. Her decision to dismiss his appeal is therefore set aside in its entirety. None of her findings shall stand.

15. I have further considered whether the judge's decision to allow the respondent to withdraw the concession in the decision letter, that the appellant had a genuine and subsisting relationship with his partner, should stand. I have decided that it cannot stand, for the reasons given at para 13(ii) and (iii) above.

16. In addition, it is clear from Mr Bassi's minutes (see para 6 above) that two of the concerns he had were without merit, i.e. that the appellant's partner had not attended the hearing and that there was no witness statement from her. These concerns simply ignore the fact that the respondent had accepted that the relationship was genuine and subsisting. There was therefore no need for the appellant to call her to give oral evidence. Indeed, if he had done so, a judge exercising reasonable case management might well have informed him that it was unnecessary for any time at the hearing to be taken up by his partner giving oral evidence given that the genuineness of the relationship was not in issue.

17. Mr Bassi's third concern (para 6(iii) above) also cannot stand, for the reasons given at para 13(iii) above.

18. Accordingly, the judge's decision to permit the respondent to withdraw the concession in the decision letter, that the relationship between the appellant and his partner is genuine and subsisting, is also set aside.

19. In view of my conclusion that the appellant did not have a fair hearing, I am satisfied that para 17.2(a) of the Practice Statements applies.

20. This appeal is therefore remitted to the First-tier Tribunal for a judge of that Tribunal other than Judge of the First-tier Tribunal Chana to re-make the decision on the appeal on the merits on all issues.

21. It would be helpful if there were to be a case management review hearing in the FtT before the appeal is listed for hearing in that Tribunal. This will enable the respondent to clarify whether or not she still wishes to withdraw the concession in the decision letter that the relationship between the appellant and his partner is genuine and subsisting. The respondent's representative will need to give reasons for any such request to withdraw the concession. In that regard, it will not be open to the respondent to rely upon the fact that there was no witness statement from the appellant's partner at the hearing before Judge Chana or that she did not attend the hearing before Judge Chana or that the appellant gave inconsistent evidence about where she was on the day of the hearing before Judge Chana, for the reasons I have given above. If the respondent is permitted to withdraw the concession, the appellant will no doubt be given time and an opportunity to decide what evidence to call in order to establish that his relationship is genuine and subsisting.

22. A case management review hearing will also give the FtT an opportunity to decide what further evidence is needed in order to establish the point in time at which the appellant ceased to have leave, whether original or leave as a consequence of making an in-time application for fee waiver. He argued before me that each application he made for a fee waiver was in time and that he therefore had

continuous leave. He relied upon an email he received from "*FHR9 Destitution Queries*" of the Home Office dated 28 January 2020 timed at 12:32 p.m. informing him that, if he proceeded to make an immigration application, he would still be considered to have section 3C leave until 30 January 2020. On the very limited material before me, it is not clear whether that was a correct statement of the legal position.

23. The respondent will be expected to attend the case management review hearing (if one is held) with copies of all relevant documents in order to assist the judge hearing the substantive appeal to ascertain the correct legal position as to the point in time at which the appellant ceased to have leave.

Decision

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 judge of the First-tier Tribunal other than Judge Chana to re-make the decision on the appeal on the merits on all issues.

Signed
Upper Tribunal Judge Gill Date: 9 January 2023

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