IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01092/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2016	**On 26 February 2016**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

JOSE F
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Chapman, Counsel, instructed by Birnberg Pierce solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal, in this case a panel comprised of First-tier Tribunal Judge A R Williams and First-tier Tribunal Judge Beach, promulgated on 15 June 2015 by which it dismissed the appellant's appeal against a decision to deport him.

2. Given that the Secretary of State does not oppose the grounds of appeal- in summary that the appeal was procedurally unfair, and it follows that the appeal will be remitted to the First-tier Tribunal it is unnecessary to go into the facts of the case.

3. It is important to set out the history of this appeal before the First-tier Tribunal, and to bear in mind that at all material times the appellant was unrepresented and in detention. He would, thus, appear to be a vulnerable adult as defined.

4. There were two Case Management Reviews in this appeal, at which the appellant was not produced through no fault of his own and when the matter did came before the First-tier Tribunal for a substantive hearing on 4 March 2015, he was without legal representation. The appeal which did take place on 4 March 2015 had been brought forward at the request of the respondent. When he did come before the First-tier Tribunal, the appellant asked to adjourn the matter as he wished to seek legal representation. That request was refused for the reasons set out in paragraph 11 of the First-tier Tribunal's decision.

5. The primary reason given by the First-tier Tribunal for refusing to adjourn the matter was that the appellant had been told that he was not entitled to legal aid and did not have the funds available to pay for a legal representative. That was the only reason recorded for the refusal, it being said that there was no real likelihood of the appellant securing legal representation without excessive delay.

6. There are lengthy and detailed grounds submitted in this case, the thrust of which is that the appellant was through a number of factors denied a fair hearing. It is also important to note that although the appellant was not at the time of the hearing in receipt of legal aid funding, that was subsequently granted because it was decided that the appellant was entitled to Exceptional Case Funding ("ECF").

7. The grounds submit firstly, that the Tribunal failed properly to have regard to the factors identified in the decision of **Farquharson (removal – proof of conduct)** [2013] UKUT 146 (IAC) and also failed to have regard to the possibility of obtaining ECF as explained in **Gudanaviciene & Ors v Director of Legal Aid & Anor** [2014] EWCA Civ 1622 (in particular at [81]-[91]).

8. It is also averred that further unfairness arose from the appellant that not being produced to Case Management Review hearings through no fault of his own and that, as he was not being legally represented at the hearing, he was not able to bring to the attention of the Tribunal a NOMS report, a witness statement which he had prepared, and to have witnesses who had attended the previous CMR attend the substantive hearing to give evidence on his behalf.

9. There are a number of factors relating to this appeal which made it complex. First, it to a significant extent on material produced pursuant to Operation Nexus. That included two Lever Arch files of material relating to the appellant. There was also in this case live evidence adduced from a serving police officer. Evidence from another police officer was relied upon but he was not present in court.

10. The guidance given in Farquharson is as follows:-

> (1) Where the respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UKUT 196 (IAC) etc applicable.
>
> (2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.
>
> (3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.
>
> (4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.
>
> (5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.
>
> (6) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available.

11. This guidance must also be seen through the prism of what was said by the Court of Appeal in **Gudanaviciene**, in respect of that appellant who was in a similar position to this appellant.

12. There is no indication that the First-tier Tribunal that they turned their minds properly to the factors identified in **Farquharson**. While it may be that this, and the other matters eloquently raised in the grounds before me, were not put to the Tribunal, it does not absolve them from a need to have regard to the principles established in the cases, or from the need to appreciate that an unrepresented, detained appellant may not even be aware of what he can say on his behalf.

13. A particular concern raised by the appellant, and which goes to the core of being unable to prepare properly, is that his appeal hearing which had previously been listed for 13 April 2015 was in fact brought forward to 4 March 2015 and that he was not notified of that until 27 February 2015. While the judges' notes show that the appellant did raise this with them, the decision is silent on this issue.

14. Although it was not clear to the appellant's representatives nor for that matter to Mr Wilding, the reason for the appeal being brought forward was the request made by the Secretary of State to that effect. That the request sets out the Secretary of State's case in some detail, setting out the difficulties that the Secretary of State saw in the appellant's case succeeding and concludes "In order to save the public purse with regard to

detention costs it is respectfully requested that the appeal hearing be brought forward".

15. There is, however, no indication on file as to who took the decision to bring the case forward nor for that is matter there any indication that the appellant's views on this were taken into account. That in my view was a serious omission on both counts.

16. It is difficult to understand how an appellant in detention, who is by that reason a vulnerable individual, should be subject to a case being brought forward at little or no notice when he is expected to deal with in a case such as this with two Lever Arch files of detailed evidence provided by the respondent. It is also unfair for an appeal to be brought forward at the request of one party to the potential detriment of the other, particularly in this case at the request of the party with considerably greater resources than an appellant who is in detention let alone to do so without notice.

17. I am satisfied that for these reasons that the appellant was disadvantaged to a considerable extent by the bringing forward of his hearing and it appears that the Tribunal were not directed to the existence of a NOMS report and a detailed statement produced by the appellant, albeit that it is handwritten. I am satisfied that, for all ob the above reasons, that it could not be said that in this case the appellant had a fair hearing. This is clearly not a case in which it could be said that had there would inevitably have been the same result.

18. Accordingly I am satisfied that the hearing was procedurally unfair, and that the decision of the First-tier Tribunal must be set aside as it involved the making of an error of law. I direct that the appeal must be remitted to the First-tier for a fresh hearing on all issues. None of the findings of fact are preserved.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal is remitted to the First-tier Tribunal for a fresh decision on all issues.
3. No anonymity direction is made.

Signed Date: 23 February 2016

Upper Tribunal Judge Rintoul