



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09720/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

**Decision & Reasons
Promulgated**

On 22 August 2017

On 7 September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCARTHY

Between

DS

(ANONYMITY ORDER CONTINUED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Patyna, instructed by Middlesex Law Chambers

For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal against the decision and reasons statement of FtT Judge Powell that was promulgated on 16 May 2017. Judge Powell dismissed the appeal against the Secretary of State's decision of 7 April 2016 refusing the appellant's human rights claim.
2. Judge Powell made an anonymity direction. Given the nature of the case, it is appropriate to preserve that direction and I order anonymity, the full terms of which are set out at the end of this decision.
3. After hearing from Ms Patyna and Mr Singh, I was satisfied Judge Powell's decision was infected with legal error to the extent it should be set aside. Given the nature of the error, and with the agreement of both parties, I

decided the appeal should be remitted to the First-tier Tribunal for a fresh hearing.

4. To understand my reasons for these decisions, it is necessary to appreciate the appeal history.
5. On 10 March 2017, notice of hearing was issued to the parties and a hearing was arranged for 7 April 2017 at the Newport Hearing Centre. The day before the hearing, the appellant's solicitors requested an adjournment because the appellant claimed he had hurt his lower back and was unable to travel from his home in Southall to Newport for the hearing. The request was refused in the following terms: *There is no medical evidence to show that the Appellant is unable to sit through his appeal hearing.* Although the appeal file does not contain any relevant medical evidence, it is obvious the response fails to address the issue posed by the representatives, which referred to the appellant being unable to travel to Newport.
6. On 7 April 2017, the appellant attended the hearing. He became ill at the hearing centre prior to the hearing and an ambulance was called. The hearing was adjourned. On the same day, notice that the hearing would be heard on 11 May 2017 was issued to the parties with directions, which included a request for medical evidence.
7. On 21 April 2017, the appellant's solicitors requested transfer of the hearing to one of the London hearing centres so that the appellant's partner would be able to attend the hearing. She had a six-year old child who was at school. The child-care responsibilities meant the appellant's partner would be unable to attend a hearing in Newport, particularly as the school had refused to authorise the child's absence. The request was refused in the following terms: *2. The address is in the Newport catchment area. 3. A transfer at this late stage, the case hearing already having been adjourned once, is contrary to the interests of justice. 4. Ample opportunity has been provided to enable any necessary arrangements to allow the witness to attend.*
8. Three points immediately arise from this reply. First, catchment areas are designed for the convenience and efficiency of the Tribunal and it is for a judge to balance those key principles with all other factors. In other words, the fact an address is within a certain catchment area does not mean an appeal cannot be heard elsewhere. Second, the previous adjournment was on medical grounds, which arose at the hearing centre, and had no bearing on the transfer request. Third, the request indicated the problem the appellant had encountered in making necessary arrangements for his partner to attend. Those factors have been overlooked.
9. The appellant attended the hearing at the Newport Hearing Centre on 11 May 2017. At paragraph 8, Judge Powell recorded that the appellant's representative applied for an adjournment because the appellant's partner was unable to attend. Judge Powell, after recording that the Secretary of State did not accept the appellant was in a relationship with his partner and therefore her immigration status would have no relevance to the appellant's case unless he found they were in a genuine and subsisting relationship, declined to adjourn. At paragraph 37, Judge Powell recorded

that he had a statement from the appellant's partner but that she had not attended because her son was at school and they did not wish to interrupt his schooling or be fined for his non-attendance. At many junctures, Judge Powell concluded the failure of the appellant's partner to attend the appeal hearing meant the appellant had failed to demonstrate he was in a genuine and subsisting relationship with her. He admitted at paragraph 40 that the attendance of the appellant's partner might have resolved a number of issues.

10. The appellant's primary ground of appeal is that Judge Powell should have adjourned the hearing because a fair hearing could not be conducted in the absence of the appellant's partner.
11. I agree with this complaint. Judge Powell recognised the potential relevance of evidence from the appellant's partner so that the nature of the relationship could be established. The Tribunal had been advised prior to the hearing of the child-care problems the appellant's partner had if the appeal were to proceed to hearing in Newport. The judge who refused a transfer does not appear to have considered the fairness of hearing the appeal in the absence of the appellant's partner and this problem is compounded by Judge Powell's decision to proceed. Bearing in mind the guidance in Nwaigwe (adjournment: fairness) [2014] UKUT 418, I am satisfied the failure to adjourn to enable the appellant to present his case in full meant there is a procedural error that amounts to an error of law because the appellant did not get a fair hearing.
12. In reaching this conclusion, I have considered what relevance the relationship between the appellant and his partner might have to his own case. On the one hand is the fact that at the date of hearing there was no evidence that the appellant's partner had any settled status. This was recognised by Judge Powell at paragraph 50. It is trite law that a person will have more difficulties proving they benefit from article 8 ECHR where their partner does not have a secure immigration status in the UK. On the other hand, the appellant's partner is the mother of a British citizen child, who has strong article 8 ECHR rights. I mention that Judge Powell did not make any findings as to the best interests of the child or the child's wellbeing; he did not do so because he did not find there to be a relationship between the appellant and the child's mother. But if there is such a relationship, then the wellbeing of the child is a very important factor that must be evaluated and assessed. In light of such considerations, it is impossible to say the outcome of the appeal would have been the same even if the evidence had been heard.
13. I add the following observations. Neither representative could advise me as to the current immigration status of the appellant's partner or whether her own appeal has been allowed or dismissed. This is an additional feature of this appeal; there has been a lack of disclosure by the parties, which hindered Judge Powell and also hinders the Upper Tribunal. This additional factor means it is necessary to remit the appeal to the First-tier Tribunal for a fresh hearing on all matters.
14. I do so with the following directions.
 - a. The appeal is to be heard *de novo*.

- b. The appeal is to be heard by any First-tier Tribunal Judge other than Judge Powell.
 - c. The remitted appeal is to be heard at the Hatton Cross Hearing Centre.
 - d. The parties must provide evidence as to the immigration status of the appellant's partner, including any decisions of the Tribunal relating to her.
 - e. The parties are at liberty to provide further evidence as long as it is received at least seven calendar days prior to the next hearing.
15. The First-tier Tribunal may amend any of these directions, subject to the overriding objective, other than the first two.

Decision

I allow the appeal to the Upper Tribunal.

I set aside the decision and reasons statement of First-tier Tribunal Judge Powell.

I direct the appeal is remitted to the First-tier Tribunal for a fresh hearing on all issues.

I impose the directions given in paragraph 14.

Order regarding anonymity

I make the following order. I prohibit the parties or any other person from disclosing or publishing any matter likely to lead members of the public to identify the appellant. The appellant can be referred to as "DS".

Signed

Date

6 September 2017

Judge McCarthy
Deputy Judge of the Upper Tribunal