



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/19886/2016

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Justice
On 19 February 2018**

Decision & Reasons Promulgated

On 22 February 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

HERBERT KULSUMU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R. Arkhurst, Counsel

For the respondent: Mr T. Lindsay, Senior Home Office Presenting
Officer

DECISION AND REASONS

1. The appellant appealed against the respondent's decision dated 30 June 2016 to refuse a human rights claim in the context of deportation proceedings.
2. First-tier Tribunal Judge Metzger ("the judge") dismissed the appeal in a decision promulgated on 26 September 2017.

3. The appellant appeals against the decision on grounds of procedural unfairness. It is not disputed that there is evidence to show that the appellant was suffering from severe back pain to the extent that he was unfit attend the hearing. This evidence was not before the First-tier Tribunal on the day of the hearing although the evidence appears to indicate that both legal representatives were aware of the fact.

4. The judge summarised his interpretation of events as follows:

“2. At the outset of the hearing, both parties indicated that [they] intended to proceed on submissions only. The Appellant had provided an unsigned witness statement but Mr Bose on behalf of the Respondent indicated that he had no issues with the witness statement and it could therefore be produced as the Appellant’s evidence. The Appellant had chosen not to attend the hearing and refused to leave prison. In the circumstances and on the basis that Mr Arkhurst had no instructions one way or the other as to whether to proceed or apply for an adjournment and Mr Bose indicated that he was in a position to proceed and that both parties had always intended to proceed on submissions only, I decided to proceed with the appeal in the Appellant’s absence.”

5. The Home Office Presenting Officer’s summary of the proceedings stated:

“Prior to the hearing the representative’s (sic) advised that they might apply for an adjournment on the basis that their client was suffering from an acute and recurring backache (evidence of condition in appellant’s bundle brought to the hearing). However, on the day the representative was not aware of the reason his client had not attended. The Tribunal were informed simply that the appellant had refused to leave the detention centre.

The judge was not willing to adjourn the matter after agreement from the parties that there were not disputes regarding the factual history. It was not clear if the claimed partner continues to support the appeal as no-one else turned up in support of the appeal, and her statement was from 2015. Additionally, whilst there was a two page medical letter citing mental health problems (such that the mother asked the appellant to leave the house), this was dated 2014 and was an initial assessment without any further update providing any further diagnosis or prognosis.

With the representative’s caveat that he had not taken instruction from his client whether he wished the matter heard by way of submission, both parties addressed the judge.”

6. The appellant’s solicitors responded to directions made by Upper Tribunal Judge Rintoul when he granted permission to appeal to the Upper Tribunal. Outlining their version of events they stated:

“With regards to the information available to our counsel we had received an email from Andres Bose the Presenting Officer dealing with the matter on the 19 [September] 2017 introducing himself and enquiring whether we were still acting for our client.

Later on we received a telephone call from our client at 15.45pm who informed us that he was suffering from an acute recurring backache and that it was very likely he would not be able to attend the hearing tomorrow as he was at the medical centre in the prison and could not move. We then sent an email to Mr Bose to inform him and also spoke to him on the telephone that it was likely that we would be applying for an adjournment as our client was not going to be able to attend the hearing because he was suffering from an acute recurring backache.

We also contacted counsel by telephone and email to notify him of the same as it was late in the day to apply for an adjournment and the hearing was listed at Hendon Magistrates Court and request that he make an application for an adjournment in court in the morning of the hearing.

On the day of the hearing we received a call from our counsel asking us to confirm the reason for client's unavailability and we told that that (sic) our client had an acute recurring backache and that it had been mentioned in his paperwork that he had this problem. Counsel then stated that he would be applying for an adjournment. Later counsel telephone and informed us that the adjournment had been refused despite the Presenting Officer confirming that we had informed him of our client's situation and that he was in agreement for an adjournment.

He said that the Immigration Judge said that an adjournment was not necessary because the client was represented. Counsel said he told the Immigration Judge that he was without instructions but that the IJ insisted on proceedings with the hearing and so he had no choice.

At the time our client was unable to send us any paperwork as he was in prison but he promised to get his doctor to write a letter confirming the same. We were therefore unable to provide any evidence on the day of the hearing other than to instruct counsel and Mr Bose was also aware of the situation."

7. Attached to the letter was a short statement from Mr Arkhurst.

"The case was before IJ Metzger (sic) at Hendon Magistrates Court. You had instructed me to ask for an adjournment and had also informed me that the HO was aware that we would be applying for an adjournment because of the appellant's unavailability due to acute back pain.

On attending Court I went to the cells and was informed by them that my client had refused to attend court. This was at variance with what you had told me so I immediately rang you up. You again informed me that the client could not attend court because of severe backache.

I then went into court and had a brief conversation with the HOPO who confirmed what you had told me. In the circumstances I informed the HOPO that I would be requesting an adjournment.

When the IJ came in he told us straight away that he had heard that the client had refused to come to court and absent and without evidence to the contrary was minded to proceed with the hearing.

I informed him of my difficulties and requested an adjournment. The IJ said an adjournment was not necessary because the client was represented I retorted that I was without instructions and was put in an invidious position baring my responsibilities under the bar code of conduct.

In the premises I opted to do the best I could for the client rather than withdraw as that would have attracted severe penalties from the bar council.”

8. A letter from the Healthcare Centre at HMP Belmarsh dated 26 September 2017 confirmed that the appellant suffers from “severe back pain issues” which had been proven by an MRI scan. The letter went on to state that “he could not move on 20th/21st and could not attend court.” He had been put on stronger medication, which was hoped would enable him to attend court.

Decision and reasons

9. In light of the subsequent medical evidence, it is not disputed that the appellant was unfit to attend the hearing due to severe back pain. It appears that both legal representatives were aware that the appellant was likely to be unwell although the evidence shows that the judge and Mr Arkhurst were misinformed as to why the appellant was not produced. The source of the misinformation is unclear although I find that it is reasonable to infer that it is likely that the error might have occurred through ‘Chinese whispers’ between the prison, transport and custody suite at Hendon Magistrates Court.
10. It is unclear from the above set of evidence whether a formal adjournment application was made. The Presenting Officer’s note and Mr Arkhurst’s recollection of events appear to suggest that some discussion might have taken place. If a formal application was made the judge did not register it in his summary of events. In any event, the judge explained why he thought he could proceed to determine the appeal in the appellant’s absence albeit that he proceeded on an incorrect assumption that the appellant had refused to leave the prison. It is unclear whether it was made clear to the judge that the appellant was in fact too unwell to attend. It appears that Mr Arkhurst was unclear as to his instructions.
11. Mr Lindsay argued that the factual background to the case was not disputed and that there was a witness statement before the judge. In light of the appellant’s history of serious offending it was unlikely that his evidence would have made any material difference to the outcome of the appeal.

12. I agree that the appellant's offending history is particularly serious. It is not necessary to outline his repeated offending in detail save to note that he has a history of convictions for robbery of an increasingly serious nature leading to sentences of detention or imprisonment for periods of two, four, nine and most recently seven years. In light of the seriousness of his offending behaviour he could only succeed in the appeal if he is able to show that there are 'very compelling circumstances' that outweigh the public interest in deportation.
13. The likelihood of the appellant's oral evidence making any material difference to the outcome of the appeal is low. Nevertheless, the process of assessing where a fair balance should be struck between the public interest in deportation and individual rights is evaluative. The appellant is entitled to give evidence in support of the appeal and for his evidence to be assessed by the Tribunal.
14. Unlike other errors of law, the question of procedural fairness is not reliant on whether the error might have made a material difference to the outcome of the appeal save in unusual cases where it can be shown that a rehearing cannot be justified on the facts of the case. The case involves important issues relating to human rights. The appellant entered the UK as a child and has been resident here for over 30 years. Although his offending behaviour is particularly serious, and will be given significant weight in favour of the public interest in deportation, it cannot be said that his human rights claim is trivial given his long residence and extremely limited connections to the country to which it is proposed he will be removed. Even if it seems unlikely that the appellant would be able to show sufficiently compelling circumstances to outweigh his serious offending, he is entitled to appear and to give evidence in support of the appeal when such serious matters are at stake.
15. The First-tier Tribunal's decision to proceed with the hearing was based on a misapprehension of the facts. It is unclear whether the judge was informed of the medical issues. The medical evidence shows that the appellant was unfit to attend the hearing. The overriding objective of the Tribunal procedure rules dictates that cases must be dealt with fairly and justly, and so far as practicable, that the parties are able to participate fully in the proceedings. For these reasons I find that the appellant should be given a fair opportunity to give evidence at a fresh hearing. I conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside.
16. I note that the appellant's medical condition is an ongoing problem. There is a limit to the number of times that the case can be relisted to enable him to attend to give evidence. The appellant and his representatives should ensure that the appeal is prepared to a good standard with a detailed and signed witness statement as well as supporting evidence. Any witnesses that the appellant wishes to call should prepare up to date statements and their attendance should be notified in advance of the next hearing. If the appellant is unfit to attend on the next occasion, and it

appears that it might be a recurrent problem, he must give his legal representatives clear instructions as to whether he is content for them to proceed to make submissions in his absence or not.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and the case remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 20 February 2018
Upper Tribunal Judge Canavan