Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00600/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 December 2018	**On 29 January 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

G M
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Shoye Legal Representative instructed by Primarc Solicitors
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to,

amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The appellant appeals with permission against the decision of the First-tier Tribunal on 23 April 2018 dismissing his appeal against the decision of the respondent to make a deportation order against him under the automatic deportation provisions of Section 32(5) of the UK Borders Act the appellant relying on Exception 1 in Section 33(2) and the provisions of Section 117C of the 2002 Act.

2. This case has a long history. The first decision was the subject of an appeal to the Court of Appeal by the Secretary of State and was remitted for lack of reasons back to the First-tier Tribunal to be redone afresh. The 2013 decision is therefore not in any sense a *Devaseelan* starting point and the appeal was reheard completely afresh in March of this year.

3. On 9 January 2018, the appellant's solicitors attended a Case Management Review hearing following which the following directions were made:

   (1) The respondent do file and serve all documents upon which she intends to rely by no later than ten working days prior to the hearing.

   (2) The appellant do file and serve all evidence relied upon in support of the appeal by no later than ten working days prior to the hearing.

   (3) The appellant do forthwith provide the Home Office with the names and addresses and Home Office reference numbers of any witnesses who are not British nationals if either party seeks additional directions they should email direct [judge's name and email address].

4. On the same day 31 January 2018, the First-tier Tribunal sent to the appellant's representatives and directly to the appellant a notice of hearing indicating that the appeal would be heard on 27 March 2018. The ten working day deadline expired on 13 March 2018 but by that date nothing had been filed and there was no compliance with the evidential element of the directions. On 26 March 2018 the appellant dismissed his solicitors and appeared in person at the First-tier Tribunal.

The First-tier Tribunal hearing

5. The appellant sought an adjournment which is dealt with at paragraphs 5 to 7 of the First-tier Tribunal's decision. The appellant told the judge that he had instructed the Bar Pro Bono Unit who had asked him supply them with a copy of the 2013 First-tier Tribunal determination. He confirmed at the end of paragraph 5 that he had an email copy of that decision but had not brought it with him to the hearing.

6. At paragraph 6 the Judge records this unchallenged version of what happened next:

> "6. *… [The appellant] confirmed that he was happy to continue with the hearing and to give oral evidence to update his circumstances in particular regarding his educational qualification.* The appellant

> confirmed that he had not prepared an up-to-date witness statement and would be relying on his previous statement, his oral evidence and oral evidence from his partner …
>
> 7. In all of the circumstances and having regard to the overriding interest under Rule 2 (First-tier Tribunal Procedure Rules 2014) I decided that it would be fair and just to proceed to hear the appeal, notwithstanding that the appellant was unrepresented. I was satisfied that he received legal advice from his former legal representatives and had instructed the Pro Bono Unit for the proceeding before the Court of Appeal. It made no sense whatsoever that the Pro Bono Unit would not have access to the 2013 First-tier Tribunal decision which was the subject matter of the Court of Appeal hearing. Furthermore, I was satisfied that the appellant himself had a good grasp of the relevant issues under Article 8 and that he had sufficient time in which to obtain the relevant papers for the purposes of representation and indeed to obtain legal representation. Indeed, he stated that he did have access to those documents on email. He confirmed that other than his degree certificate there were no other documents that he wished to rely on at the hearing. I specifically asked if he had any report from his GP or other material and he did not. I was mindful of the fact that this was a deportation appeal and a serious matter to the appellant but the legal issues were not complex and that it was a matter outstanding since 2013."

The judge proceeded to hear the appeal and dismissed the appeal.

Permission to appeal

7. The appellant appealed to the Upper Tribunal. In granting permission, Upper Tribunal Judge Kebede said

> "It is just arguable that in circumstances where there had previously been a successful appeal and a remittal from the Court of Appeal where there was a suggestion of pro bono legal representation being available and where there was no up-to-date statement available the judge arguably acted unfairly by proceeding with the appeal without an adjournment. Such an arguable error arguably impacted upon the other grounds of appeal and accordingly all grounds are arguable."

8. Mr Melvin has produced a Rule 24 Reply, which is out of time but which I admit, which says this:

> "3. It is respectfully submitted that the judge deals with the adjournment request in paragraphs 5 to 6 of the determination culminating in the First-tier Tribunal Judge finding 'he confirmed that he was happy to continue with the hearing of the oral evidence to his up-to-date circumstances … he would be relying on his previous statement and his and his partner's oral evidence'.
>
> 4. In these circumstances it will be submitted it cannot be seen as procedural unfairness.
>
> 5. It is further submitted that the judge has considered the best interests of the children (paragraph 20) and in considering

> proportionality the judge (paragraph 18 to 28) has given an in-depth analysis of the evidence making findings open to her on the evidence provided.
>
> 6. It will be submitted that the decision is neither unreasonable nor irrational.
>
> 7. It submitted that read holistically the judgment makes complete sense and discloses no material error in law."

9. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

10. At the hearing today, the applicant appeared by his new representatives, CM Law solicitors, who accepted a retainer on the day before the hearing. Mr Shoye, a legal representative with CM Law, appeared for him.

11. There was no witness statement from the appellant and no evidence had been filed about the effect of the absence of representation before the First-tier Tribunal. Mr Shoye said that the appellant had been unable to afford representation before the First-tier Tribunal.

12. Mr Melvin relied on his Rule 24 Reply.

Analysis

13. The grounds of appeal raise two issues, first, whether there should have been an adjournment of the First-tier Tribunal hearing, and second, the reasonableness of separating this appellant from his children by deporting him to his country of origin.

14. I begin with the adjournment request. The decision by the First-tier Judge to proceed with the hearing was unarguably open to her. The appellant had been legally represented until one day before the First-tier Tribunal hearing. The appellant has not challenged the First-tier Tribunal's statement that he was prepared to proceed on the day. The Judge was also entitled to have regard to the appellant's failure to comply with directions for the service of further evidence, though it seems that the only piece of further evidence he wished to put in was his degree certificate.

15. As regards the children, the question of reasonableness arises only under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended), which is expressly limited to non-deportation cases. In order to resist deportation, the appellant needed to bring himself within Exception 1 or Exception 2 in section 117C of that Act. The appellant in his grounds of appeal does not contend that either Exception 1 or Exception 2 in Section 117C is applicable to his circumstances. The Judge in the First-tier Tribunal gave proper, intelligible and adequate reasons for considering that the children's best interests could not outweigh the paragraph 117C(1) presumption in favour of deportation.

16. Any judge now dealing with this appeal would be guided by the decision of the Supreme Court in *KO and Others (Nigeria) v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53 and the reasoning of Lord Carnwath JSC, who gave the judgment of the Court, and with whom Lord Kerr JSC, Lord Wilson JSC, Lord Reed JSC and Lord Briggs JSC concurred, in particular at paragraph 23:

> "23. … the expression 'unduly harsh' [in section 117C] seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under Section 117B(6) [which applies to those who have not committed offences in the United Kingdom] taking account of the public interest in deportation of foreign criminals. … The relevant context is that set by Section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. …."

17. On the evidence which the appellant chose to put before the First-tier Tribunal, it was unarguably open to the judge to find that the appellant's children, whilst undoubtedly close to their father, would suffer no more than what Lord Carnwath describes as the degree of harshness which would necessarily be involved for any child faced with the deportation of a parent.

18. Neither of the grounds of appeal is arguable. This appeal has no prospect of success before a First-tier Judge. There is no material error of law in the decision of the First-tier Tribunal and this appeal is dismissed.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Signed Judith AJC Gleeson Date: 18 January 2019

Upper Tribunal Judge Gleeson