Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10903/2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 14 October 2019	**On 18 October 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ABAAG
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: in person.
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge M A Khan promulgated on 14 August 2019, following a hearing at Harmondsworth on 1 August 2019, in which the Judge dismissed the appellant's appeal on human rights grounds.

Discussion

2. The appellant, a male citizen of Nigeria born on 5 June 1980, appealed the respondent's decision to refuse an application for leave on human rights grounds, relied upon by the appellant to prevent his deportation from the United Kingdom.
3. The Judge records at [5] an adjournment application made by the appellant on the basis that he had applied for exceptional funding from the Legal Aid Board for him to be legally represented. The Judge sets out his reasons for refusing the adjournment in the following terms:

> "5. Having heard both sides, I refused the appellants adjournment application on the basis that there is no guarantee that the appellant will be granted exceptional funds by the Legal Aid for him to be represented at these proceedings. He has not provided any compelling reasons as to why he could not represent himself. The appellant had sufficient time to make an application for exceptional funding and/or instruct legal representatives."

4. The Judge records that the appellant gave oral evidence which together with the documentary evidence submitted was taken into account in arriving at the decision to dismiss the appeal.
5. The appellant sought permission to appeal claiming the adjournment application should have been granted as he did not have a lawyer to represent him and was unable to represent himself. The appellant claims the decision is unfair as the refusal of the appeal was central to his life and the lives of his five children.
6. Permission to appeal was granted by another judge of the First-Tier Tribunal in relation to this aspect of the challenge in the following terms:

> "As asserted, there was materially arguable that as a matter of natural justice the Judge erred in refusing the appellant's application for an adjournment to await the outcome of his public exceptional funding application to enable him to have the benefit of legal representation in his appeal. Notwithstanding the degree of delay in the appellant making his application for funding, there appears to have been bear account had of the constraints those in immigration detention may face. The appellant furnished a copy of this application for public funding providing *prima facie* a detail of reasonings supporting his request for public funding, and why he was unable to effectively represent himself. It was not shown in any real way that those reasons were weighed in the judicial assessment. Furthermore, refusing the appellants adjournment application renewed at his hearing *inter alia* on the basis that there was no guarantee he would be granted funding for representation appeared to set the bar at an unreasonable height for an appellant to meet, more especially, given that there was no guarantees *per se* when applications are made for exceptional funding.

7. Tribunals have considerable experience in dealing with appellants appearing without the benefit of professional representation. Constraints on the grant of public funding for immigration and asylum cases is the reason why many appellants have to either pay privately for representation or appear as litigants in person. There is no arguable error, per se, in the Judge considering whether the appellant was able to represent himself in relation to this appeal.
8. The appellant was asked at the Initial Hearing before the Upper Tribunal whether he had been granted public funding. He confirmed he had not and had received a request for further information from the Legal Aid

Board. The Judge's concern that there was no guarantee the public funding will be granted within a reasonable time, or at all, has not been shown to be a conclusion infected by arguable legal error.

9. In relation to delay, the Judge noted the respondent's decision to deport the appellant was made on 10 April 2018 and his application for leave on human rights grounds refused in May. The actual deportation order was made in June 2019 yet the application for public funding was not made until 17 July 2019 indicating delay in the appellant's actions. The Court of Appeal in *Kigen and Cheruiyot [2015] EWAC Civ 1286*, at [29] wrote:

> "In the light of the old authorities to which I have referred, solicitors in general may have been under the impression that any delay awaiting a decision by the Legal Aid Agency would simply be ignored if an extension of time were required as a result. That is not the case and it is to be hoped that any such misunderstanding will have been dispelled as a result of the decision in this case. Those acting for parties in the position of these appellants will in future need to take steps either to lodge the necessary form promptly on behalf of their clients or to advise them of the need to do so on their own behalf. Failure to lodge the necessary request within the prescribed time may in future result in an extension of time being refused. However, given the degree of uncertainty that surrounded the matter, I am persuaded that to refuse an extension of time in this case will be to impose on these appellants greater prejudice and is justified by the delay"

10. *Kigen and Cheruiyot* involved an individual seeking an extension of time for lodging judicial review proceedings. Although that is not the situation appertaining in this appeal the principle concerning the need for individuals to make applications for public funding promptly are equally applicable to statutory appeals. The appellant in this case did not do so which the Judge was arguably entitled to take into account.

11. Of more importance, when assessing the fairness of the Judge's actions, is the nature of the case itself. It was not made out the case involved particularly complex issues for which specialist legal representation would have been required. The appellant had provided documentary evidence and also gave oral evidence and was subject to cross-examination. The Judge clearly understood the core elements of the appellant's case and it is clear from the evidence that the appellant received a fair hearing. It is not made out that the only decision available to the Judge on the facts was to adjourn the appeal. The overriding objectives are designed to ensure effective and expeditious disposal of legal business in a fair and just manner. It is not made out the decision of the Judge infringes these principles. No arguable legal error is made out on this ground.

12. First-tier Tribunal Judge Simpson also granted permission to appeal in relation to a second issue concerning the structure of the decision and the issues the Judge was required to assess in the following terms:

> "(ii) additionally, by way of *Robinson* arguable error, the Decision disclose the Judge having misconceived the issues before them, in law, failing to address that the appellant's Art 8 human rights appeal concerned deportation under S5(1) with reference to S.3(5)(a) of the Immigration Act 1971, his deportation having been

deemed by the respondent under para 398(c) to the Immigration Rules (the Rules) to be conducive to the public good, because he had been convicted of an offence which caused serious harm, possessing/controlling ID documents with intent when sentenced to 30 weeks imprisonment, not as addressed by the Judge an automatic deportation arising under the UK Borders Act 2007, citing incorrectly a sentence of 12 months;

(iii) notwithstanding having gone on correctly to address para 399 and 399 A of the Rules, it was arguable that in failing to have afforded the appellant reasonable time to await the outcome of his public funding application for legal representation, that the absence of supporting information of which the Judge found a concern, would have potentially been mitigated;

(iv) the Decision disclose an overall inadequacy of reasoning."

13. The decision under challenge, the respondents refusal of the appellant's human rights claim clearly informed the appellant that the Secretary of State had decided to make a deportation against him under section 5(1) of the Immigration Act 1971 and refers to the fact that on 11 January 2019 the appellant was convicted at Snaresbrook Crown Court for possession/control of identity documents with intent for which he was sentenced on 11 February 2019 to 7 months 14 days (30 weeks) imprisonment. The appellant did not appeal either conviction or sentence.
14. There is arguable merit in the assertion the Judge erred in law when stating at [1] that the appellant appealed the respondent's decision made under section 32(5) UK Borders Act 2007 and [10] in which the Judge refers to section 32 of that Act and to the appellant have been sentenced to a period of 12 months imprisonment.
15. The power to make a deportation order is found in Section 3(5) of the 1971 Act which gives the Secretary of State power to deport a non-British Citizen (a) if he deems it to be conducive to the public good (b) if another member of the family is to be deported and (c) if a court recommends it after conviction of an offence punishable by imprisonment. Section 3(5)(a) is reflected in paragraph 363 of the Immigration Rules, which states that a person is liable to deportation where the Secretary of State deems that person's deportation to be conducive to the public good. Where the automatic deport provisions do not apply it is a question of fact as to whether deportation is conducive to the public good.
16. Such appeals previously required consideration of the provisions of paragraph 364 the Immigration Rules although the same has now been revoked. Since paragraph 364 was deleted for post July 2012 applications, the rules simply assert at paragraph 397 that a deport order will not be made if it would be contrary to the UK's obligations under the Refugee Convention or the ECHR or, if not contrary to those obligations, in exceptional circumstances. Paragraphs 398, 399 and 3999A then set out the requirements to consider when assessing the Article 8 position.
17. The Judge refers to the provisions of these relevant paragraphs at [12-13] clearly demonstrating that the correct test was at the forefront of

the Judge's mind. There is no right of appeal against the deportation decision, the only right of appeal being against the refusal of the human rights application.

18. The first finding of note made by the Judge relates to the question of whether the appellant is a credible witness. At [34] the Judge finds he is not for the reasons set out which are adequately reasoned and have not been shown to be findings not available to the Judge on the evidence.
19. The Judge finds that the appellant had not provided any evidence to demonstrate he has been in the parental relationship with his claimed five children in the United Kingdom, that the appellant came to the UK at 20 years of age having spent his childhood and formative years of his life in Nigeria where he stated he was studying medicine at University, and where he has three siblings living who will be able to assist him on return. At [41] the Judge states:

> "41. I have considered all aspects of 2014 Act and come into my decision and find that the appellant does not have any qualifying aspects under any of the subsections for this legislation. In the circumstances I find that the respondent's decision is wholly proportionate to deport this appellant to Nigeria."

20. The reference to the 2014 Act is a reference to section 117 of the Nationality Immigration and Asylum Act 2002 and specifically 117 C which is applicable to deportation appeals opposed on human rights grounds. The Judge's conclusion is clear; that the respondent had established on the basis of the evidence made available that the decision to deport the appellant is proportionate to any interference with a protected right relied upon in this appeal.
21. I find that although reference to a sentence of 12 months and to the automatic deportation provisions is wrong the Judge clearly applied the correct test when assessing the human rights aspects of the appeal and it is not made out the decision which effectively upholds the deportation order as being proportionate is outside the range of reasonable conclusions available to the Judge on the evidence.
22. Whilst the appellant disagrees with the Judge's findings and clearly seeks a more favourable outcome to enable him to remain in the United Kingdom the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant a grant of permission to appeal to the Upper Tribunal.

Decision

23. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 16 October 2019