



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

Appeal Number: HU/13685/2017

THE IMMIGRATION ACTS

Heard at Field House

On 22nd March 2019

**Decision & Reasons
Promulgated**

On 30th April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**ALABA [J]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Peer, Peer & Co (LR)

For the Respondent: Mr S Whitwell (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Graham, promulgated on 2nd August 2018, following a hearing at Birmingham on 25th June 2018. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 8th December 1972. He appealed against the decision of the Respondent Secretary of State dated 18th October 2017 refusing his application for leave to remain in the UK as the partner of [AS], and as the parent of [AM], a child present in the UK.

The Basis of Refusal

3. The letter of refusal dated 18th October 2017 was based on the contention that the Appellant did not meet the definition of a partner as he and [AS] were not married and had not been living together in a relationship akin to marriage for at least two years prior to the date of the application. Moreover, he did not have sole responsibility for the child and failed to provide evidence that he had access to the child.

The Judge's Findings

4. The judge held that the matter was listed for an oral hearing but that:-

“There was no Home Office Presenting Officer at the hearing. The appellant was not legally represented at the hearing. The Appellant did not attend the hearing, neither did any of his witnesses. I am satisfied the appellant was aware of the hearing as a notice of the time date and place of hearing was sent by first class post to the appellant and his representative on 21st May 2018” (paragraph 5).
5. The appeal was dismissed.

Grounds of Application

6. The Grounds of Application state that there has been a procedural error because neither the Appellant nor his solicitors actually received notification of a hearing. When they had last appeared in court, before the Tribunal, they had asked for an adjournment on 17th May 2018, before IJ Anthony at Birmingham Priory Court. This was on the basis that they had a letter dated 16th May 2018 that their son was in hospital for a cancellation operation to remove his tonsils. This had previously been cancelled. The mother and the ex-partner were due to give evidence at the Tribunal with the son in hospital. The judge had stated that there was no evidence from the hospital but that nevertheless the matter was adjourned with a direction that the evidence of the operation should be served. Thereafter, the next thing that the Appellant heard was that Judge Graham had actually determined the appeal and had decided against the Appellant.
7. Second, there had been a material change in the circumstances which needed consideration in that an application was now before the Family Court for contact with the child that needed further consideration.

8. Permission to appeal was granted on 23rd August 2018. This was on the basis that before Judge Anthony on 17th May 2018, the Appellant had attended with his representative. The appeal was then adjourned because of the inability of the child's mother to attend due to the ill-health of the child. The hearing was then relisted for Monday, 25th June 2018 before the judge. Notice of the hearing was said to have been sent to the Appellant and to his representatives on 21st May 2018. There was no indication on the Tribunal file that either had changed their address. Yet neither the Appellant nor the representative had attended the hearing on 21st May 2018. However, if the Appellant had not received a Notice of Hearing, then that was a different matter.

Submissions

9. At the hearing before me on 22nd March 2019, Mr Peer, appearing on behalf of the Appellant, submitted that he would state today in open court as "the officer of the court" that neither he nor his client, the Appellant, received any notification of a hearing. Earlier, before the hearing, Mr Whitwell, who appeared on behalf of the Respondent, had helpfully handed up a note, that had been taken by the Presenting Officer on 17th May 2018. It set out the fact that the parties had asked for an adjournment because the child's mother could not attend the hearing as the child was in hospital, although there was no evidence of the hospital appointment before the Tribunal. Nevertheless, what the note did was to make it clear that the matter was adjourned with a direction that the evidence of the operation be provided. This letter ends with the statement "Next hearing date 25th June 2018". However, Mr Peer submitted that both he and the Appellant were in the court room when the matter was adjourned. They had then left the courtroom. They know full well that at no stage did the judge actually announce that the next hearing date would be 25th June 2018. If that had been done, it was arguable that there had been an oral communication of the next hearing so that they had notice of it. That, however, Mr Peer submitted, was not the case.
10. Second, and more significantly, Mr Peer submitted that he had sent a fax dated 2nd July 2018, on 3rd July 2018, at 12:41 hours from his firm to the Tribunal asking why they had still not been informed about the next hearing date. This letter states:-

"We attended court on the 17th May 2018 and the matter was adjourned. We have not had a further listing of this case and I would be grateful if you would be kind enough to confirm whether the court has relisted this matter, and if the matter has been relisted, kindly send us a full notice of hearing."
11. Mr Peer submitted that he would not be writing in those terms, if he was not anxious to find out the date of the hearing.
12. Third, the letter that he had sent by fax on 3rd July 2018, was, in any event, at least a month before the decision of Judge Graham was promulgated, having been heard on 25th June 2018. At no stage did anyone in the

Tribunal service see it fit to inform the Appellant's representative that there was a free listed hearing now on 25th June 2018.

13. For his part, Mr Whitwell submitted that it remained the case that not only was the Appellant not represented at the hearing before Judge Graham, but that neither was the Respondent Secretary of State represented. There was no HOPO on that day. That, however, was irrelevant. What was significant was that the Appellant's representative had made no enquiries for at least six weeks, and he could have acted with expedition earlier on. Also, it appeared that the Appellant's representative had moved address from Villa Road to their new address at Witton Road, Birmingham. At this stage Mr Peer made it clear that the firm was at the earlier address at 95 Villa Road in Birmingham until 21st May 2018. Therefore, had notification been sent earlier, informing the Appellant's representative of the date of the hearing, they would have been able to receive this at their former address. But in any case, no such notification was received by them.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. My reason is as follows.
15. First, this is a case where, Mr Whitwell accepts, that the note from the Presenting Officer, Anna Brown, dated 17th May 2018, with respect to the hearing before IJ Anthony in Birmingham on 17th May 2018, is not a verbatim and contemporaneous note written at the hearing. It is a summary. It ends with the statement that "Next hearing date 25th June 2018". That being so, I am prepared to find that during the hearing itself the judge had not announced the next date. That remained to be sent to the parties in due course in the normal manner.
16. Second, I find that the Notice of Hearing thereafter for 25th June 2018, was not sent. The judge's finding (at paragraph 5) is that it was sent and it was sent by first class post. However, neither the Appellant nor his legal representative received it.
17. Third, and in any event, on 3rd July 2018 Mr Peer sent a fax, dated 2nd July 2018, enquiring about the free listed date and expressing concern at not having any knowledge of it. Given that this was the case, I find that there was a procedural error on the part of the Tribunal, in not informing the Appellant and his representative of the hearing. As Mr Peer submitted, he had nothing to gain, and everything to lose by not attending court. Today all the witnesses were in attendance, having travelled from Birmingham, and they would certainly have done so when the hearing was in Birmingham on 25th June 2018.

Notice of Decision

18. The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. I remake the decision on the basis of Practice Statement 7.2(a) of the Practice Direction because the Appellant has not had a fair hearing and this matter properly ought to return back to the First-tier Tribunal, to be determined by a judge other than Judge Graham.
19. No anonymity direction is made.
20. This appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge Juss

25th April 2019