Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22636/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice **Decision & Reasons Promulgated**
On 8 July 2019 **On 14 August 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SAMKELO [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Holt instructed by Turpin & Miller LLP (Oxford)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of South Africa. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 10 October 2018 making a deportation order and a decision of 11 October 2018 refusing his human rights claim.

2. The issue in this matter as it developed before me concerns the judge's decision to refuse to adjourn the appeal.

3. There were two bases upon which this was made, and noted by the judge at paragraph 10 of his decision. First was the appellant not attending and

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the second related to proceedings under the Children Act 1989 filed by the appellant at Stoke-on-Trent Combined Court on 8 October 2018.

4. As the judge’s decision records, the appellant was detained at HMP Huntercombe in Oxfordshire and was to have been brought to HMP Nottingham on the day before the appeal hearing, which was listed at the Nottingham Justice Centre on 15 April 2019. It became clear during the morning that the appellant was still at Huntercombe and apparently was refusing to leave his cell. There was an exchange of emails between the judge’s clerk and a member of the prison staff at Huntercombe. The prison staff were asked to confirm what they had said and the reason why the appellant had refused to leave the prison as the judge required a reason. The reply was that the appellant had refused to leave HMP Huntercombe to go to HMP Nottingham and thereby attend court. The importance of attending had been explained to him but he had still refused.

5. Counsel, (Mr Holt) told the judge that his instructing solicitors had been expecting the appellant to attend and asked the judge to adjourn in case the appellant’s refusal to be transported was based on the belief that he was going to be moved to HMP Nottingham and not return to HMP Huntercombe where he might have built up good relations.

6. As regards the application under the Children Act, Mr Holt told the judge that his instructing solicitors had heard no more about those proceedings since the appellant started them in October 2018. Although he was without instructions on this aspect he said he would have been asking the appellant about the current position and advising him to seek an adjournment to await the outcome of proceedings in accordance with the principles in RS [2012] UKUT 00218 (IAC). He argued that the outcome of those proceedings was likely to be material to the immigration decision and asked the judge to take into account with regard to the timing of the application that the child had been born while the appellant was in custody.

7. There was then a further exchange via emails with the prison. The prison staff were asked what the specific reason was why the appellant refused to leave prison and was he aware that moving him to Nottingham was necessary for him to attend his appeal today. The reply was “He was aware of the need to go to court via another prison. The reason for non-attendance according to him was that he was told by his solicitor that he was going to get it re-scheduled and that there was not enough evidence”.

8. The judge noted that this reply was inconsistent with what Mr Holt had earlier told him about the instructing solicitors expecting the appellant to attend the appeal hearing. The judge noted a letter on the file showing that the solicitors had been representing the appellant since his signed authorisation to that effect of 29 November 2018. At the Case Management Review hearing on 18 January 2019 the original substantive

date of 8 February 2019 was adjourned to 15 April 2019 to give the appellant's solicitors time to prepare.

9. The judge noted that the subsequent letters from Turpin & Miller enclosing the appellant's bundle and then the supplementary bundle did not seek a further adjournment and contained nothing to suggest that they and the appellant were not ready to proceed. The judge came to the conclusion that the appellant had on his own initiative decided that his case was not ready to proceed and that by refusing to be transported to the hearing he hoped to secure a further adjournment. On that basis, the judge considered that his failure to attend was not in itself a reason to adjourn, but an adjournment might still be appropriate as in any appeal where further relevant evidence about family court proceedings involving a child of an appellant was not yet available was expected to become available within a reasonable time an adjournment might be justified.

10. The judge went on to consider whether this was such a case and concluded that it was not, and no issue has been taken with the findings in that regard.

11. The judge dismissed the appeal and the appellant sought and was granted permission to appeal by the First-tier Tribunal.

12. The first ground, was that the judge's decision was contrary to the guidance in Khmelkevich (00/TH/01718) in that the judge had failed to say whether or not he was satisfied that due notice of the time and place of the hearing had been given and this was a procedural requirement which if breached amounted to an error of law, as was found by the Tribunal in Khmelkevich.

13. Mr Holt argued both in the grounds and in his oral submissions that it was clear what the reasoning behind the strictness of the requirement to make clear findings as to the satisfaction of the first Rule was, in that proceeding in the absence of an appellant was an action carrying severe consequences and therefore it was strictly incumbent upon a decision-maker to indicate that the Rule had been complied with. The judge had failed to say specifically whether or not due notice of the time and place of the hearing had been given to the appellant and that in fact the second communication received from the appellant seems to suggest the contrary, at least those were the apparent assertions of the appellant.

14. The second ground, as set out and also as developed by Mr Holt in his submissions was that the judge had given insufficient reasons for his findings on the appellant's intentions. He had concluded that the appellant had on his own initiative decided that his case was not ready to proceed and that by refusing to be transported to the hearing he hoped to secure a further adjournment. The judge had also noted the apparent contradiction between the communications from the prison (that the appellant claimed to be acting upon instructions) and from the appellant's

representatives (that the appellant's absence was not instructed). He argued that the appropriate remedy to resolve this conflict was to adjourn and allow the appellant to give evidence on the matter.

15. Rule 28 of the Tribunal Procedure Rules 2014 states as follows:-

"**Hearing in a party's absence**

28. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

16. Khmelkenich concerned a refusal by a Special Adjudicator to adjourn an appeal where it was said that the appellant would not be fit to attend the hearing due to illness and that a medical certificate would be provided to substantiate this. The Adjudicator noted that the medical certificate referred to the appellant's unfitness to attend an interview rather than referring to an appeal hearing and exercised his discretion to hear the appeal in the absence of the parties in accordance with Rule 33 of the Asylum Appeals (Procedure) Rules 1996.

17. The Immigration Appeal Tribunal criticised the judge for not saying under which of the sub-Rules of Rule 33 he decided to proceed and had not said whether or not he was satisfied that new notice of the time and place of the hearing had been given and that it was at least incumbent on the Adjudicator to make it clear that the formalities of the Rules had been complied with. It also noted that the mandatory sub-Rule (3) applied only if there was no satisfactory explanation for the absence of the party concerned and there was in fact such an explanation. It was considered that the doctor's certificate stating that the appellant was not fit to attend an interview as a matter of common sense must extend to a court appearance at which evidence subject to cross-examination was to be given. Accordingly the decision was set aside and remitted for a fresh hearing.

18. With regard to ground 1 in the instant appeal, the judge did not specifically state that he was satisfied that due notice of the time and place of the hearing had been given. However, as was pointed out by Mr Clarke, it is abundantly clear from the documentation that the appellant and his representatives were aware of the date, time and place of hearing. As the judge noted at paragraph 15, at the CMR the original substantive hearing date was adjourned to 15 April 2019. That the appellant was aware of the hearing date for 15 April 2019 is amply testified to by the letter he sent on 5 April 2019 seeking an adjournment of the hearing listed for 15 April 2019. That application was refused on 11 April 2019 where it was said that the application could be renewed at the outset of the

hearing. The appellant had said that he requested an extension of time to submit a witness statement in support of his appeal and sought an extension of four months. In fact there was a witness statement in the bundle before the judge in the hearing at any event. The covering letter to the bundle referred to the hearing date of Monday 15 April at the Nottingham Justice Centre. Accordingly, I agree with Mr Clarke that it is entirely clear that due notice of the time and place of the hearing had been given and it was in my view unnecessary for the judge formally to refer to that in the circumstances where documentary evidence made it abundantly clear that that was the case.

19. As regards the second ground, again it does not seem to me that the judge erred. The evidence relayed from the prison staff was that the appellant was aware of the need to go to court via another prison and said that he was not attending because his solicitor had told him he was going to get the hearing re-scheduled and there was not enough evidence. That as the judge noted, was inconsistent with what Mr Holt on instructions had told him in that they were expecting the appellant to attend the appeal hearing. In my view it was a perfectly reasonable inference for the judge to draw from the account being given by the appellant that he had on his own initiative decided his case was not ready to proceed and that by refusing to be transported to the hearing he hoped to secure a further adjournment. He must have known that his earlier adjournment request had been refused since the refusal was sent to him. Clearly he had not been told by his solicitor that the hearing was going to be re-scheduled and that there was not enough evidence. The bundle including his own witness statement had been provided to the Tribunal. I do not think the judge erred in refusing to adjourn in light of the apparent contradiction between what was said by the prison staff on the appellant's behalf and what the appellant's representatives said. It was fully open to the judge rather than resolving this conflict by an adjournment to decide as he did. Although he did not refer to it, the overriding objective as set out at Rule 2 of the Tribunal Procedure Rules 2014 sets out the purpose of enabling the Tribunal to deal with cases fairly and justly and includes ensuring so far as practicable that the parties are able to participate fully in the proceedings but also involves avoiding delay so far as compatible with proper consideration of the issues. Here the appellant had made a deliberate choice not to attend. He was not prevented as appears that may well have been the case in Khmelkevich, by reason of inability to attend. He made a deliberate choice which the judge was entitled to find was not as a consequence of anything that he had notified to his solicitors. The decision involved a proper exercise of the use of the judge's discretion with regard to proportionality which is another relative element of Rule 2. I do not consider that any error of law in the refusal to adjourn in this case has been identified and as a consequence the appeal is dismissed.

20. No anonymity direction is made.

Signed Date 10 July 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

Signed Date 10 July 2019

Upper Tribunal Judge Allen