Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00208/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 21st February 2020	**On 14th April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR OLALEKAN JAY ADEYOOLA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No Appearance
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. His appeal against the respondent's decision to make a deportation order under s5(1) Immigration Act 1971 was dismissed by First-tier Tribunal Judge Oxlade for reasons set out in a decision promulgated on 22nd July 2019.

2. The appellant did not attend the hearing of the appeal before me. Notice of the hearing listed before the Upper Tribunal was sent to the parties on 17th January 2020. As the appellant had not arrived at 10:00am, I put the

matter to the end of the list. The matter was called on at 12:20pm and there was no appearance by or on behalf of the appellant and there was no explanation for the appellant's absence. Having checked the Tribunal file, I am satisfied that the notice of hearing was properly served upon the appellant at his last known address. The notice of hearing was sent by first class post to the same address set out by the appellant in his email to the Tribunal on 17th July 2019. I am satisfied that it is in the interests of justice to proceed to hear the appeal in the absence of the appellant.

3. The appellant had not attended the hearing of his appeal before the First-tier Tribunal on 15th July 2019. Although he was represented by Duncan Lewis Solicitors when the appeal was lodged, and the notice of the hearing before the FtT was sent to the parties, Messrs Duncan Lewis had notified the Tribunal on 9th July 2019 that they no longer act for the appellant. At paragraphs [34] and [35] of the judge stated:

> "34. The appellant did not attend the hearing, though clearly aware of it, which I deduce from the fact that (i) he submitted a bundle of documents with a covering letter also dated 9th July 2019 in which he said that it was for the hearing on 15th July, and (ii) that the notice of hearing was sent to him at his home address on 30th April 2019, and (iii) that he attended a CMR in person before IJ O'Keeffe on 16th May 2019, before which time the substantive hearing date was set. I had regard to her note of the CMR in which the appellant said that friends may attend the hearing, that he volunteers as *(sic)* the Citizens Advice Bureau; as to a partner he was not sure if she would give evidence as they do not currently live together though he has a relationship with a child whose nationality he did not know as he could not get a passport for him; he wanted to obtain medical evidence as a victim of torture, who referred him to a group and they are looking to support him.
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> 35. The appeal was called on at 12:30; the usher checked the reception (but the appellant had not checked in), and the office (there was no phone message to say that he was late/ill/otherwise unable to attend).

4. It appears that the appellant did in fact attend the 'Harmondsworth Hearing Centre', not on 15th July 2019, but the day after, on 16th July 2019. He has provided a note stamped by a member of staff at the hearing centre confirming that he attended the hearing centre on 16th July 2019 and was told that his appeal had been heard in his absence the previous day. On 17th July 2019, the appellant sent an email that was addressed to 'Judge Oxlade' apologising for his absence at the hearing. In that email, the appellant confirms he was informed by his previous representatives, by telephone, that public funding had been withdrawn and he should "attend court on 16th July 2019…". He was provided with a bundle that he

should post to the Tribunal. The appellant states he attended the Tribunal on 16th July 2019, expecting his appeal to be heard on that day but was informed that the appeal had in fact been listed for hearing on 15th July 2019.

5. The appellant now appeals to the Upper Tribunal. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on 14th August 2019.

6. The respondent has filed a Rule 24 response dated 4th September 2019 that was adopted by Mrs Aboni. The respondent opposes the appeal and submits the appellant seeks to blame his previous representatives regarding the mix-up as to the date upon which his appeal was listed for hearing, but has provided no documentary evidence confirming that he had been told that his appeal was listed for hearing on 16th July 2019. It is said the appellant's previous representatives had made it clear that they no longer act for him, and there is no reason why his representatives would have provided him with an incorrect hearing date.

7. In the absence of the appellant at the hearing of the appeal before me, without any explanation, I have a degree of sympathy with the matters set out in the rule 24 response. However, in the end, in my judgment the question is whether the appellant was deprived of his right to a fair hearing before the FtT.

8. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? *See* SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.

9. The judge cannot in any way be criticised for proceeding to hear the appeal in the absence of the appellant, for the reasons identified in her decision. It was plainly the proper course to adopt. However, it is now apparent that the appellant did in fact attend the hearing centre on 16th July 2019, and he has provided evidence to support that claim. He has provided a slip from Harmondsworth hearing centre stamp dated 16 July 2019, which confirms the appellant's appeal was heard in his absence on 15th of July 2019 but that he attended on 16th July 2019. That was followed up by an email sent to the Tribunal by the appellant on 17th July 2019.

10. The underlying decision that gave rise to the appeal is a decision to deport the appellant. The appellant relies, *inter alia*, upon his relationship with a child in the UK and the length of his presence in the UK. I cannot be satisfied that the judge would have reached the same decision if the appellant had attended the hearing. This is not an appeal in which the presence of the appellant at the hearing and the evidence he gave would have made no difference.

11. I stress there can be no criticism of the FtT judge. It is unfortunate that the appellant had understood that his appeal was listed for hearing on 16th July 2019. Whether that was because of misinformation from his previous representatives or his own misunderstanding, he did attend the hearing centre on 16th July 2019. The appellant explains that he was told that the hearing was listed on 16th July 2019 by telephone, and he was provided with a sealed bundle that she should send to the Tribunal in readiness for the hearing of his appeal. If that is correct, it is perhaps unsurprising that the appellant cannot point to any written communication from his previous representatives and the bundle sent to the Tribunal by the appellant referred to a hearing on 15th July 2019. There has plainly been some miscommunication or misunderstanding as to the date of the hearing on the appellant's part.

12. I accept that the decision of the F*t*T is infected by an error of law and that the appropriate course is for the decision of First-tier Tribunal Judge Oxlade to be set aside. As to disposal, the appropriate course is for the matter to be remitted for rehearing in the First-tier Tribunal afresh, with no findings preserved.

Decision:

The decision of First-tier Tribunal Judge Oxlade promulgated on 22nd July 2019 is set aside and matter is remitted for rehearing before the First-tier Tribunal with no findings preserved.

Signed Date 6th April 2020

Upper Tribunal Judge Mandalia

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.