Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00738/2018 (P)

THE IMMIGRATION ACTS

Decided without a hearing **Decision & Reasons Promulgated**
On 12 August 2019

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

PAULINA [J]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant is a Polish national who was born on 7 September 1995. She appeals against a decision which was issued by First-tier Tribunal Judge Roots ("the judge") on 2 March 2020, dismissing her appeal against the respondent's decision to deport her to Poland on public policy or public security grounds.

2. The appellant states that she came to the UK in 2012. She studied here but I do not understand it to be said that she worked. She lived with her parents in the West Country. Her father worked for a tyre-fitting company.

3. Unfortunately, the appellant began to use drugs during her time in the UK. Her use was recreational at first but, as is so often the case, she

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developed a habit which turned into an addiction. Criminality followed on from addiction and she began to accumulate convictions for acquisitive offences which she had committed in order to raise money for drugs.

4. The appellant's two children were made the subjects of Special Guardianship Orders by the Family Court and continue to live with her parents in Bristol. The appellant's life spiralled out of control, culminating in the respondent's decision to deport her from the United Kingdom on the ground that she represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK. That decision was made on 1 October 2018.

5. The respondent also issued a certificate under regulation 33 of the Immigration (EEA) Regulations 2016, preventing the appellant from remaining in the United Kingdom whilst any appeal against her decision was pending. The appellant appealed against the respondent's decision on 16 November 2018. The time for bringing the appeal was extended by a Tribunal Caseworker on 20 November 2018. As a result of the certificate, however, the respondent was able to remove her from the United Kingdom on 23 November 2018.

6. The appeal was first listed in Newport on 14 December 2018. Her current representatives (Osprey Solicitors) wrote on 11 December 2018, however, to state that they had only recently been instructed and that they would benefit from additional time. The appeal was adjourned until 21 February 2019. That listing was also adjourned, although the reasons for the adjournment are not clear to me from the Tribunal's file. What is clear is that the appellant was, by that stage, seeking to re-enter the United Kingdom so that she could be present at her appeal hearing (regulation 41 refers).

7. The appeal was duly re-listed on 5 March 2019, now at Taylor House but, in due course, that hearing was changed to a Case Management Review Hearing ("CMRH"). At the CMRH (before Judge Aujla) it was agreed on all sides that the appeal should proceed substantively in three months' time but that there should be an additional CMRH before that listing. Directions were set and the further CMRH was set for 23 July 2019, with the substantive hearing to take place on 5 September 2019. The respondent was directed, by Judge Neville at the CMRH in July, to explain what she had done to facilitate the appellant's admission under regulation 41.

8. The respondent wrote on 9 August 2019, stating that she had answered the appellant's request for re-admission in February but that she had heard nothing since. As a result, the respondent invited the Tribunal to proceed in the appellant's absence on 5 September. A Designated Judge was persuaded that this was the correct course and he ordered that the hearing

would remain in the list. The appellant's solicitors wrote on 22 August 2019, however, and sought an adjournment so that DNA reports could be completed, confirming the relationship between the appellant and her children. That persuaded the FtT to adjourn once again and the appeal was relisted before for a further CMRH before Designated Judge Peart on 21 November 2019. The appeal was relisted to be heard substantively on 11 February 2020.

9. The appellant booked tickets to travel to the UK on 10 February and to return to Poland on 12 February but she lost her Polish ID card and was unable to send it to the respondent so that arrangements could be made for her return. The respondent advised the appellant's solicitors to apply for an adjournment and to re-apply for readmission to the UK when a new date was notified. The appellant's solicitors duly applied for an adjournment but it was refused on the papers, with the Designated Judge noting that the appellant had had considerable opportunities to make the necessary arrangements.

10. So it was that the appeal came before Judge Roots on 11 February 2020. The appellant was represented by counsel (Mr Khan), the respondent by a Presenting Officer (Ms Ayodele). Mr Khan sought an adjournment so that the appellant could return to the UK to be present at the hearing. He explained that the appellant had lost her ID card and was trying to obtain a new one. Judge Roots refused the application for the following reasons:

> "[18] Mr Khan renewed the adjournment request which had been made a few days prior to the hearing and refused on 10 February. This stated that the appeal could take place in her absence. He sought an adjournment to enable the appellant to attend. His submissions are set out in the Record of Proceedings. The presenting officer opposed the adjournment request. I refused the request. The history is set out above. There have been multiple adjournments on this case. There is no evidence from the appellant in support of the submissions which Mr Khan made. There is no evidence from any authorities in Poland that she is trying to get any new ID card. She apparently reported as long ago as 2 January that this had been lost but there is no concrete evidence of any steps taken. I refused the adjournment request."

11. The hearing therefore proceeded in the appellant's absence. The judge concluded, in brief summary, that the appellant continued to represent a genuine, present and sufficiently serious threat to the UK because she had not taken any proven steps to address her addictions. And he concluded that her exclusion from the United Kingdom was a proportionate step under the Regulations and Article 8 ECHR on account of that threat.

12. Permission to appeal was sought on the single ground that it had been unfair for the judge to proceed with the hearing in the appellant's absence. Permission was granted by Judge Grant-Hutchison on the basis that that complaint was arguable.

13. On 24 June 2020, the papers were placed before Upper Tribunal Judge Kamara, who formed the provisional view that progress might legitimately be made in the appeal notwithstanding the ongoing difficulties as a result of the Covid-19 pandemic. Her provisional view was that the Upper Tribunal could fairly and justly consider without a hearing the questions of whether the FtT had erred in law and, if so, whether its decision should be set aside. She invited written submissions on the merits of the appeal and she made it clear that any submissions about the application of rule 34(1) (decision without a hearing) would also be considered by the Upper Tribunal.

14. Written submissions were duly filed by the parties. Neither sought an oral hearing. I bear the absence of any such request in mind, as rule 34(2) requires me to do. I also consider whether the appeal can be determined fairly and justly without an oral hearing. In considering that question, I bear firmly in mind what was said by the Supreme Court in Osborn v Parole Board [2014] 1 AC 1115. There is a single question at issue in this appeal. Both parties have made full written submissions upon it. There are no disputed questions of fact, and the credibility of a party or witness is not in issue. In the circumstances, I am entirely satisfied that the appeal can be determined fairly and justly on the papers.

15. For the appellant, Mr Khan submitted that the judge had failed to consider the over-riding objective of dealing with cases fairly and justly, and had failed to consider what had been said by the Upper Tribunal in Nwaigwe [2014] 418 (IAC). The guiding consideration for the FtT had been fairness but it had failed to consider that issue, or even to mention it. The appellant had sought a short adjournment so that she could obtain a new ID card and attend the hearing. It was clear that the appellant's absence from the hearing had played a material part in the judge's decision to dismiss the appeal because, for example, he had noted that he would attach less weight to her statement as a result of her absence.

16. For the respondent, Mr Lindsay accepted that there had been no reference to the over-riding objective or to fairness. He also accepted that the appellant's absence from the hearing had played a material part in the judge's reasons to dismiss the appeal. He nevertheless submitted that the decision to refuse was not unfair because there had been numerous adjournments before the hearing in front of the judge and there had been no evidence whatsoever to support the claim that the appellant had lost her ID card and that she had applied for another one.

Analysis

17. In Nwaigwe, the then President of the Upper Tribunal gave guidance which was summarised in the judicial headnote in this way:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. 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."

18. With respect to the judge, I feel bound to conclude that his decision to refuse an adjournment was erroneous in several respects, even before considering whether that decision was ultimately fair. As submitted by Mr Khan, the judge failed to apply the correct test (fairness) and he failed to mention or to consider the over-riding objective of dealing with cases fairly and justly. Fairness and the over-riding objectives were material matters which the judge failed to take into account. The errors into which he demonstrably fell may be described in any or all of these three ways.

19. Robust case management is to be encouraged and a judge on appeal should be slow to interfere with case management decisions made by hard-pressed judges at first instance. These principles are trite. It is nevertheless imperative that any application for an adjournment is considered and decided on the proper footing. I am unable to detect anything in the judge's decision, with respect, which indicates that he did so. Whilst he was justifiably frustrated by the inordinate amount of time which had passed since the appeal was first lodged in the FtT in 2018, he was nevertheless bound to consider the application to adjourn the hearing to enable the appellant to attend with a view to deciding whether or not it would be fair to proceed in her absence. His failure to do so is necessarily an error of law.

20. Mr Lindsay accepts that the judge's consideration of the application was not as it should have been. Ultimately, however, he submits that the judge's error does not justify the setting aside of his decision because, on any proper view, the decision not to adjourn was the only one which a judge could have reached on the facts of this case. The appellant had lost

her ID card some time before the hearing and she had failed to produce any evidence that she had applied for a new one. Mr Lindsay submits that any judge, properly directing himself to Nwaigwe and to the over-riding objective, would have refused to adjourn.

21. Whilst I have considerable sympathy for the respondent's submissions, I am ultimately unable to accept what is said by Mr Lindsay. The absence of evidence that the appellant had lost her ID card, or that she had applied for a new one, was necessarily a relevant consideration for the judge to bear in mind. The fact that there was no evidence of either assertion militated in favour – and strongly in favour – of refusing the adjournment request. So too did the absence of any indication from Mr Khan of the amount of time that it might take to acquire a new card. But these were not determinative considerations, even if it meant that the judge would be unable to identify a date in the future when the appeal could be expected to proceed substantively.

22. What the judge was required to consider was whether it was fair to proceed in the appellant's absence, and it was also relevant for him to consider – as part of that analysis – (i) the fact that the appellant has an EU Law right (subject to public security considerations) to be present for her hearing; and (ii) the prejudice which might arise if she was not present. Given the significance which he attached to her absence from the hearing, it is likely that he would have concluded that prejudice was likely to arise if he proceeded in her absence.

23. I am not able to conclude, in the circumstances, that the only fair course was to proceed with the hearing on 11 February 2020 in the absence of the appellant. The judge could have put the matter back in the list for counsel to make further enquiries of the appellant and/or his instructing solicitors as to the timescales involved. He could have adjourned the hearing to a further CMRH in a week's time so that further information could be provided. Although there was an absence of evidence in support of the application, and even though the appeal had run an unsatisfactory course before it reached the judge, the point had not been reached where the only fair course was to proceed without the appellant. With some reluctance, therefore, I hold that the judge erred in refusing to adjourn and that his decision must be set aside. Given that the effect of the error was to deny the appellant a fair hearing, the only permissible course is for the appeal to be remitted to the FtT to be heard by a judge other than Judge Roots.

24. Months have now passed since the events I have described above. I firmly expect that the appellant now has the replacement ID card which she required and that she should be able to travel to the UK. Of course, different considerations now abound, and I am not sure whether travel between Poland and the UK is possible at present. I therefore direct that

the appellant's solicitors must, no later than 10 working days after this decision is issued:

Notify the First-tier Tribunal at Taylor House of whether:

(i) The appellant still wishes to attend the hearing of her appeal;

(ii) An application is to be made to the respondent to facilitate her admission for that purpose;

(iii) The appellant has all of the documents which are required for that application and to travel to the UK;

(iv) There are any Covid-19 related difficulties, whether related to travel arrangements or otherwise, which might bring about a request for a delayed listing

Notice of Decision

The decision of the FtT was erroneous in law and is set aside. The appeal is remitted to the FtT, to be heard afresh by a judge other than Judge Roots.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 August 2020