Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12289/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 7 March 2022 **On 11 March 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ARCHIBOLD MENSAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr. E Tufan, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of Judge of the First-tier Tribunal Burns ('the Judge') sent to the parties on 29 December 2020 by which his appeal against the decision of the respondent to refuse him leave to remain on human rights grounds and to seek to deport him to Ghana was dismissed.

2. Judge of the First-tier Tribunal Holmes granted permission to appeal on all grounds by a decision dated 2 July 2021.

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Proceeding in the absence of the appellant

3. The appellant was not in attendance when the hearing commenced at 2.30pm.

4. We were satisfied that the notice of hearing was sent on 18 February 2022 to the address provided to the Upper Tribunal by the appellant: rule 13(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules'). We noted that the appellant has previously not attended hearings in these proceedings despite having received requisite notice. Indeed, he has attended none of the six hearings to date held in the First-tier Tribunal and this Tribunal. We concluded at the hearing that it was in the interests of justice to proceed in the absence of the appellant: rule 38 of the 2008 Rules.

Anonymity

5. The Judge did not issue an anonymity order. We note the observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. We are satisfied that the appellant in this matter has already been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so properly considered to be known to the local community. We consider that there is no requirement to name the appellant's children, nor to provide details as to where they live and the schools they attend. In the circumstances, we conclude that the public interest protected by article 10 ECHR outweighs the appellant's private life rights protected article 8 ECHR: *In Re: Guardian News and Media Ltd and Others* [2010] UKSC 1, [2010] 2 AC 697.

6. We do not make an anonymity order.

Background

7. The appellant is a national of Ghana and presently aged 32. He entered the country in April 1996, when aged 6, with entry clearance to join his mother. On 26 March 1997, when aged 7, his passport was endorsed with 'No Time Limit'.

Criminal convictions

8. At the date of the hearing before the Judge, the appellant had accumulated sixteen convictions between 2015 and 2017. His offending behaviour encompassed a wide range of criminal activity included attempted robbery, racially aggravated assault, ABH, handling stolen goods, criminal damage and several counts of possessing controlled drugs (class A and B).

9. On 26 November 2007 the appellant was sentenced at Harrow Crown Court to a total of three years' imprisonment at a Young Offender Institute in relation to three counts of handling stolen goods.

10. Following a police investigation into the operation of a brothel in Hounslow the appellant, who was believed to be acting as 'security' and supplying drugs at the premises, was arrested. On 12 July 2017, at Isleworth Crown Court, he was sentenced to a total of twelve months' imprisonment in relation to (1) possession of a class B drug (cannabis) with intent to supply, (2) being concerned in the making of an offer to supply to another a class B drug (cannabis), and (3) failure to comply with the community requirements of a suspended sentence order.

11. HHJ Robinson remarked when sentencing the appellant, *inter alia*:

> 'What you were doing was taking cannabis to a brothel and selling it to those who were working in the brothel. There are not any aggravating features as to pressing drugs on vulnerable women, or anything of that nature: you were simply selling drugs for profit.'
>
> 'The other aggravating feature in this case is your record, not least your breach of a suspended sentence. In October of 2015, you were given a short, suspended sentence by this court for very similar offending, selling drugs for money, cannabis in particular. And you, no doubt, were told that if you were caught for an offence carrying imprisonment in the following period, that sentence would be activated.'

12. We observe that the appellant has been convicted of several offences following the hearing before the Judge. These are not matters that are relevant to our consideration at the error of law stage.

Hearing before the First-tier Tribunal

13. Mr. Cal Harding attended the hearing as a McKenzie Friend, in the absence of the appellant.

14. The Judge noted the following in his decision:

> '4. Mr. Harding told me that the Appellant was 'dropped' by his solicitors about 18 months ago.
>
> 5. Mr. Harding is not a professional lawyer but has two law degrees and is studying for the bar. He is acting for the Appellant as a Mackenzie friend on a pro bono basis. His address is [...]. He has not signed a section 84 for today's hearing but has been accepted as a Mackenzie Friend for the Appellant at previous hearings. I accepted him as such for today.
>
> 6. Mr. Harding applied for an adjournment, reading to me an email he had sent on 16/12/2020 which I had not received. He stated that this appeal has been previously adjourned pending determination of further criminal proceedings against the Appellant on a charge of robbery, and that these were now due to be heard at Isleworth Crown Court on 18 July 2022. The Appellant

was on bail. As these proceedings have not yet come on, he wants another adjournment until they are over.

7. Mr. Harding has not spoken to the Appellant for many months but the Appellant's girlfriend on 3/12/2020 had told Mr. Harding that the Appellant had received the notice of today's hearing (which the Tribunal had sent out on 24/11/2020 to the Appellant's last known address). Mr. Harding has recently emailed the CVP joining instructions to the Appellant but the Appellant had not replied to the email. He was unable to provide me with a telephone number that worked for the Appellant.'

15. The Judge refused the adjournment request:

> '8. I refused the application for an adjournment because (i) I was not satisfied that any previous adjournment was for the purposes of awaiting a further criminal trial in 2022, because Mr. Harding had not provided any documentary evidence of this and Mr. Armstrong was unable to confirm it and the last notice of hearing contradicted it; (ii) even if any previous adjournment of this appeal was for the purposes of awaiting a further criminal trial in 2022, I did not agree to further adjourn today's appeal hearing on that basis as I regard it as absurd – the deportation decision appealed against was based not on prospective convictions or acquittals but on the Appellant's previous persistent offending prior to the deportation order being made in May 2018; (iii) it is undesirable given the history of this matter and the fact that the deportation order was as long ago as May 2018 to further delay the appeal against it for a further 19 months; (iv) the Appellant had received a notice telling him that the appeal was going ahead today and had had ample opportunity to adduce evidence and could and should have joined the hearing today to give evidence, but had unreasonably failed to do so, and (iv) [sic] I had no confidence that if I adjourned the appeal that the Appellant who had been dropped by his solicitors and who obviously was not staying in touch with his Mackenzie friend Mr. Harding, would properly prepare for and appear at any later appeal hearing in any event.'

16. The entirety of the appellant's appeal was addressed by the Judge in three short paragraphs:

> '9. Having refused the adjournment I invited Mr. Harding to present the Appellant's appeal but he stated he 'had no instructions' and declined to do so.
>
> 10. The appellant has the onus of proof in both the deportation and the Article 8 appeal but has failed to adduce any evidence in discharge of that onus.
>
> 11. Mr. Armstrong referred me to Chege v. Secretary of State for the Home Department [2016] UKUT 187 (IAC) which states that deportation is justified on the grounds of persistent offending. It is clear that the Appellant is a persistent offender. The Appellant has 8 convictions for 16 offences. After winning his last deportation appeal, the Respondent had sent him a letter warning him that if

he re-offender another deportation order would be made, but despite this he had re-offended repeatedly. ‘

Grounds of Appeal

17. The appellant relies upon two grounds of appeal:

    i) He enjoyed a legitimate expectation that the appeal hearing would be adjourned

    ii) The Judge failed to engage with his contention that very significant obstacles existed as to his integration upon return to Ghana: section 117C(4) of the Nationality, Immigration and Asylum Act 2002 (‘the 2002 Act’).

18. In granting permission to appeal on both grounds, Judge Holmes reasoned, *inter alia*:

    ‘3. It is difficult to see any arguable error in the refusal to adjourn the hearing and the Appellant offered no explanation for his failure to attend it, or to provide instructions to his representative. On the other hand, it is arguable that it is difficult to see from this very brief decision that the Judge engage with any of the evidence adequately, and gave adequate reasons for his decision.’

Decision on Error of Law

Ground 1 – Refusal to adjourn

19. The appellant’s first ground complains the Judge erred in not adjourning the hearing:

    ‘3. The reasons the [sic] FTJ Burns gave for refusing the application for an adjournment, at para. 8 of his judgment, are contrary to the Records of Proceedings: December 2018, June 27, 2019, December 4, 2019, March 5, 2020 and June 22, 2020, which were before him. Those adjournments or CMR’s [sic] were for the expressed [sic] purpose of awaiting the outcome of the extant proceedings in the Isleworth Crown Court.’

20. The appellant’s contention that he enjoyed a legitimate expectation that the hearing on 22 December 2020 would be adjourned is entirely misconceived. The assertion that the adjournment of previous hearings was for the express purpose of awaiting the outcome of extant criminal proceedings at Isleworth Crown Court enjoys no basis in fact and by advancing it the appellant has sought to mislead.

21. The hearing held at Taylor House on 4 December 2018 was a preliminary CMRH and Mr. Harding, on behalf of the appellant, confirmed that the matter was ready to proceed to substantive listing.

22. Judge of the First-tier Tribunal Shore adjourned the substantive hearing on 27 June 2019 at the request of the appellant because he was unrepresented and had not complied with directions. Judge Shore confirmed in his written decision and directions that “by a fine margin …

the overriding objective that requires a fair and just trial, but also requires the avoidance of delay and wasting of costs, was best served by granting an adjournment".

23. The hearing on 4 December 2019 was adjourned because the appellant had failed to inform the Tribunal that he had been in custody since September 2019, thereby precluding his production from prison.

24. At the CMRH held on 5 March 2020, Judge of the First-tier Tribunal Keane understood the appellant's trial as listed to commence on 22 June 2020 and the appellant wished to secure reports from his probation officer and a charity that assists offenders. Judge Keane adjourned the hearing for a CMRH in four months, namely July 2020.

25. Covid-19 directions were issued by the Tribunal to the parties on 22 June 2020 and a CMRH listed on 9 July 2020 was vacated on 7 July 2020.

26. We are satisfied that on no occasion was a judicial decision made in either 2019 or 2020 to stay proceedings until the conclusion of the appellant's trial now understood to be listed in July 2022.

27. McCloskey J confirmed in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) that the test to be applied by us is that of fairness: was there any deprivation of the appellant's right to a fair hearing?

28. The appellant has been informed prior to the date of the hearing before the Judge in December 2020 that his criminal trial was listed to commence in July 2022, some 19 months hence. We consider the Judge to have fairly decided that it was undesirable for the hearing of the appeal to be further delayed. We further find that the appellant was aware of the hearing, as confirmed to the case by Mr. Harding, and simply decided not to attend having failed to comply with the directions issued by the Tribunal on 5 July 2019. In the circumstances, we are satisfied that the Judge acted fairly, and the appellant was not deprived of his right to a fair hearing.

Ground 2 - Substantive assessment of appeal

29. The Judge observed at [10] that the appellant had failed to adduce any evidence in discharge of the burden of proof. However, the Judge should properly have had in mind the accepted facts as to the appellant's age when entering this country, the circumstances of his arrival and that he enjoyed settled status. The Judge should properly have been alive to the requirement that he consider section 117C(4) of the 2002 Act.

30. The Judge's engagement with the appellant's case runs to the six lines at [11] of his decision. He noted the respondent's reliance upon *Chege* and makes a finding that the appellant is a persistent offender having accumulated eight convictions for sixteen offences. The Judge then observed that having been successful on appeal in 2009 (IA/08020/2008) the appellant received a letter from the respondent in 2014 warning that if

he re-offended consideration would be given to issuing a deportation order. The Judge proceeded to observe that the appellant had re-offended.

31. No further assessment was undertaken.

32. The approach adopted by the Judge was entirely inadequate. He failed entirely to engage with the statutory regime established by Part 5A of the Nationality, Immigration and Asylum Act 2002, or with article 8 outside of the Rules. No factual assessment was undertaken as to the appellant's circumstances: particularly as to his having resided in this country from the age of six and the settled status he had enjoyed for twenty-three years at the time of the hearing.

33. We conclude that the decision is fatally flawed for material error of law. There is a lack of any cogent reasoning on core elements of the appellant's human rights appeal.

Resumed Hearing

34. Mr. Tufan accepted that it was appropriate that the remaking of the decision be undertaken by the First-tier Tribunal.

35. We note the presumption that the remaking of a decision will take place in this Tribunal: para. 7.3 of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (11 June 2018). However, we are satisfied that the nature of extent of any judicial fact finding which is necessary in order for the decision to be remade is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

36. The decision of the First-tier Tribunal promulgated on 29 December 2020 involved the making of a material error on a point of law and is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

37. No findings of fact are preserved.

38. The remaking of the decision will be undertaken by the First-tier Tribunal.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 10 March 2022