IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000247
First-tier Tribunal No:
HU/00194/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

FG
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Bahja, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 7 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant, a citizen of Jamaica, appeals to the Upper Tribunal, with permission granted by Upper Tribunal Judge O'Callaghan on 29 January 2024, against the decision of First-tier Tribunal Judge J P Howard promulgated on 22 December 2023. The First-tier Tribunal Judge dismissed the Appellant's appeal against the refusal of the Appellant's human rights claim and deportation order dated 16 September 2021.

2. In summary, the background to this appeal is as follows:

- 13 August 2001 - the Appellant arrived in the UK when he was 16 years old and was granted six months' leave to remain as a visitor.
- 12 February 2002 - the Appellant made a further application for leave to remain and was granted leave to remain as a dependent child until 15 April 2003.
- 1 April 2002 – the Appellant made an application for leave to remain which was refused on 12 December 2003 and his appeal against that decision was dismissed.
- 7 August 2006 – the Appellant was arrested as an overstayer and released on reporting conditions.
- 25 July 2007 - the Appellant was arrested on suspicion of drug offences and later released. He absconded from his reporting conditions in 2008.
- 24 August 2011 - the Appellant was sentenced to eighteen months' imprisonment for drug offences.
- 13 July 2012 a stage 2 deportation decision was made. His appeal against that decision was allowed and he was granted 30 months' leave to remain on 26 April 2013.
- 13 November 2015 - the Appellant made an application for further leave to remain, the application was refused on 21 December 2016 and he did not appeal.
- 11 February 2018 – he came to the attention of the immigration authorities, was released on reporting conditions but failed to report.
- 22 May 2020 - the Appellant was convicted and sentenced to 30 months' imprisonment for possessing controlled drugs with intent to supply - Class A- Heroin.
- 1 June 2020 - the Appellant was served with a notice of a decision to make a deportation order against him and in response he made a human rights claim under Articles 3 and 8 of the ECHR.
- 16 September 2021 - the Respondent signed a Deportation Order against the Appellant and made a decision to refuse his human rights claim.
- 29 September 2021 - the Appellant appealed against that decision.
- 13 July 2022 – the Appellant made further submissions on the grounds that his deportation would breach the UK's obligations under the Refugee Convention as well as the ECHR and claimed asylum on the basis that he had been a victim of human trafficking in Jamaica and that he had been sexually abused when aged 8. He claimed a fear from criminal gangs in Jamaica.
- 30 August 2022 - the Single Competent Authority made a positive reasonable grounds decision but on 3 May 2023 a negative conclusive grounds decision was made.
- 14 August 2023 – the Respondent made a supplementary decision refusing the Appellant's claim against deportation on the grounds of a breach of the Refugee Convention.

The hearing in the First-tier Tribunal

3. At the hearing of the Appellant's appeal on 4 December 2023 there was an application for an adjournment which the judge dealt with at paragraphs 19 to 23 of the decision as follows:

> "19. At the outset of the hearing, it was noted that the appellant had failed to attend the hearing. The appellant's representative applied for an adjournment. I was prepared to put back the matter for a short time to allow enquiries to be made as to the reasons for the appellant's absence.
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> 20. The matter subsequently came back before the court. The appellant's representative renewed his application to adjourn. The appellant's representative explained that he had been unable to contact the appellant. The appellant's representative explained that a person purporting to be the appellant's uncle had stated that the appellant was ill but was unable to give any further details.
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> 21. The respondent's representative opposed the application for adjournment on the basis that no evidence had been provided to explain what the appellant's medical illness was or why that prevented him from attending the hearing.
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> 22. In considering whether to adjourn the hearing, I have had regard to the decision of the Upper Tribunal in *Nwaigwe (adjournment: fairness) [2014] UKUT00418 (IAC)*. The test to be applied is that of fairness and the question I must ask in this case: is there any deprivation of the appellant's right to a fair hearing?
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> 23. Taking into consideration the overriding duty to deal with cases timely and fairly, I was not prepared to adjourn the matter. I note that no medical evidence had been provided to the Court to explain what medical problems the appellant was purportedly suffering from. I note that the application to adjourn was not made until during the hearing itself, and that very little information had been provided to explain why the appellant was unable to attend the hearing. I noted that the appellant has provided a bundle of evidence together with his witness statement and was represented. I did not find that the appellant was deprived the right to a fair hearing in my refusal to adjourn the case."

4. The judge went on to consider the appeal substantively and dismissed the appeal. The judge found that the Appellant did not come within any of the exceptions to deportation under Section 33 of the Borders Act. The judge found that the Appellant had not rebutted the presumption that he has been convicted of a particularly serious crime and constitutes a danger to the community of the UK in accordance with Section 72 of the Nationality, Immigration and Asylum Act 2002. In the alternative the judge found that the Appellant had not established that he had a real persecutory risk on return to Jamaica for a Convention reason but that in the alternative internal relocation in Jamaica would not be unreasonable or unduly harsh and that he had not demonstrated that he could not seek effective protection from the authorities in Jamaica.

5. The judge rejected the Appellant's appeal under Article 3 of the ECHR finding that he had not demonstrated that he is at real risk of facing inhumane, degrading treatment, punishment or torture. The judge found that the Appellant had not established that his return to Jamaica would breach Article 8 on the basis of his private and family life.

Permission to appeal

6. The Appellant applied for permission to appeal. First-tier Tribunal Judge Lester refused permission on 16 December 2024. The Appellant renewed the application for permission to the Upper Tribunal and, in a decision dated 29 January 2024, Upper Tribunal Judge O'Callaghan granted permission emphasising that Ground 1 should be the focus of submissions at the error of law hearing.

Grounds of appeal

7. There are four grounds. It is contended in Ground 1 that the First-tier Tribunal Judge failed to apply the fairness test in refusing the adjournment request. It is contended in Ground 2 that the judge made perverse findings of fact in the asylum matter. Within Ground 2 it is contended that the judge erred in finding that the Appellant was not a victim of human trafficking, in the finding that the Appellant had not rebutted the Section 72 presumption and in the findings on sufficiency of protection. It is contended in Ground 3 that the judge erred in failing to give proper reasons for dismissing the appeal under the Article 3 protection limb and in his assessment of internal relocation. It is contended in Ground 4 that the judge erred in his Article 8 assessment in consideration of the previous decision of the Immigration Tribunal in 2012.

The hearing in the Upper Tribunal

8. At the hearing before me Mr Bahja and Mr Avery both accepted that if Ground 1 is established it is not necessary to consider the remaining grounds as, if it is established that the refusal of the adjournment request was unfair, then the rest of the grounds fall away. The focus of the oral submissions was on Ground 1.

9. In his submissions, Mr Bahja contended that the reasons given at paragraph 23 by the judge for refusing the adjournment request - that there was no medical evidence, that the application was only made on the day of the hearing, and that there was little information to explain why the Appellant was unable to attend the hearing – were inadequate in the circumstances of this case. In his submission the judge failed to apply the case law properly and failed to consider whether the Appellant would be deprived of the right to a fair hearing.

10. Mr Bahja acknowledged that the judge had a bundle of documents before him. However, he highlighted that at paragraph 66 the judge said that he had not been provided with any additional evidence to corroborate the Appellant's account of being a victim of trafficking or having been subjected to sexual assault other than his own statement. Further, at paragraph 67 the judge said in respect of the Appellant's own account *"I note that the appellant has failed to attend court and as such has denied the respondent opportunity to challenge his account by way of cross examination"*. In Mr Bahja's submission there is a logical inconsistency between paragraph 23 and the judge's conclusions at paragraphs 66 and 67. He submitted that the judge deprived the Appellant of a fair hearing and of an opportunity to address these matters which the judge held against him. It is clear from the conclusions at paragraphs 66 and 67 that credibility was in issue and therefore infected the judge's decision.

11. In terms of the Appellant's previous convictions and the Section 72 presumption, Mr Bahja highlighted that the Probation Report concluded that the Appellant is at low risk of reoffending and at medium risk of non-violent reoffending. In his submission, the judge made findings of fact which were inconsistent with that evidence. The conclusions there could have been different

had he heard oral evidence from the Appellant. In his submissions other findings of fact were infected by this approach.

12. Mr Avery submitted that the Appellant was represented and had submitted a bundle of evidence and witness statement and should have been able therefore to make his case without giving evidence. In his submission it was fair for the judge to proceed as this case differs from the situation in **Nwaigwe** as the judge here had a bundle and a statement from the Appellant and was entitled to take that into account when deciding whether to proceed. In his submission, the conclusion at paragraph 66 would have been the same regardless of the Appellant's attendance because it addressed the lack of additional evidence. In his submission it was open to the judge to note and observe that the Appellant had failed to attend court and denied the Respondent the opportunity to cross-examine. In his submission it is clear that the judge considered the Appellant's evidence and had sufficient evidence to make a decision in relation to the trafficking aspect of the Appellant's claim. In terms of fairness, he submitted that the Appellant had every opportunity to put his case forward. The vague assertion that the Appellant was ill without any further explanation was not enough. The judge was entitled to take this into account in deciding whether to adjourn. There is still very little current evidence as to why the Appellant failed to attend. The ultimate question is whether it is fair on the Appellant, the judge had the information and had to make a decision whether it was fair to proceed and he did so. In Mr Avery's submission this was a sound decision.

13. In response, Mr Bahja submitted that fairness requires giving the Appellant the opportunity to engage in the hearing. The decision was made on the basis that the judge was unaware of the reasons for the Appellant's non-attendance but efforts were made to explain the Appellant's difficulties on the day and the Appellant should have been given the benefit of the doubt. In his submission the reasons given at paragraph 23 were not sound in law. There was no medical evidence because that could not be obtained on the day. There was an explanation for the Appellant's absence as a result of the communication between the Appellant, his uncle and the representative. In his submission fairness is about participation in the hearing, if an Appellant attended a hearing and took ill and was unable to participate then it would not be fair to proceed with the hearing.

14. Further evidence was submitted including a statement from the solicitor dated 3 January 2024 who said that he called the Appellant on the date of the hearing as the Appellant did not attend the hearing. It stated that the Appellant's uncle answered the phone and told him that the Appellant was feeling too ill to leave bed and that Counsel made an adjournment application on that basis. According to the statement the Appellant answered the solicitor's call after 4 p.m. and told him that he was feeling too ill and could not attend the hearing.

15. The Appellant's uncle submitted a statement dated 3 January 2024 stating that the Appellant was feeling too ill to leave his bed on 4 December 2023. He said that the solicitor had called the Appellant's phone and that he (the uncle) answered the phone and explained that the Appellant was feeling too ill to attend.

16. The Appellant himself submitted a statement dated 3 January 2024 in which he said that his solicitor spoke to his uncle who said that the Appellant was feeling too ill to leave his bed and could not attend the hearing. He said that he

requested a sick note from his GP but he could not see his GP on the day and the GP did not give a sick note as he did not attend the GP surgery on the day.

Error of Law – discussion and conclusions

17. I have considered the adjournment request in the light of the decision in **Nwaigwe** where the Upper Tribunal said that, in considering whether to grant an adjournment:

> "6. … tribunals should be alert to the doctrine of abuse of process. In cases where the Tribunal considers that an adjournment application is based on spurious or frivolous grounds or is vexatious, the requirement of demonstrating good reason will not be satisfied. However, this will not be determinative of the question of whether refusing an adjournment request would compromise the right to a fair hearing of the party concerned. In some cases, adjournment applications based on particularly trivial or unmeritorious grounds may give rise to an assessment that the process of the Tribunal is being misused and will result in a refusal. Tribunals should be very slow to conclude that the party concerned has waived its right to a fair hearing or any discrete aspect thereof. Where any suggestion of this kind arises, it will be preferable to evaluate the conduct of the party concerned through the lens of abuse of process and it will always be necessary to give effect to both parties' right to a fair hearing.
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> 7. 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? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.
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> 8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:
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> *"First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse.* ***The test and sole test was whether it was unfair****".*
> [My emphasis]
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> Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration

> and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

18. The judge clearly considered the appropriate case law in **Nwaigwe** and properly identified that the issue was one of fairness and the judge properly directed himself to the question as to whether there was any deprivation of the Appellant's right to a fair hearing [paragraph 22]. The judge dealt with the matter at paragraph 23 stating that he was not prepared to adjourn the matter giving three reasons.

19. The judge gave three main reasons for refusing the adjournment at paragraph 23. It is firstly stated that no medical evidence was provided to the court. I consider that in this instance, where the Appellant was said to be ill in bed and in the current climate when it can be difficult to access a GP in order to provide evidence on the day, that this in itself is not sufficient reason to refuse an adjournment without more.

20. The judge also took into account that the application to adjourn was not made until during the hearing itself but I note that if someone takes ill on the day then that is when an application will be made.

21. The judge further took into account that little information had been provided to explain why the Appellant was unable to attend the hearing. Whilst I accept that little information was provided, I note that the Appellant's solicitors via Counsel informed the Tribunal that they had been in touch with the Appellant and that he was unwell and was unable to attend the hearing. This was therefore information of some weight given by officers of the court to the Tribunal.

22. The judge also took into account that the Appellant provided a bundle of evidence together with his witness statement and was represented. The judge therefore appeared to consider that he had adequate evidence in order to enable him to make a decision.

23. However, in stating at paragraph 66 that there was no additional evidence to substantiate the Appellant's account of being a victim of trafficking or having been subjected to sexual assault other than the Appellant's own statement and the statement of VB, the judge effectively ruled out the possibility that the Appellant's oral evidence could have added to the evidence on this matter.

24. In saying at paragraph 67 that, in failing to attend court, the Appellant had denied the Respondent the opportunity to challenge his account (in relation to his claim to be a victim of trafficking and having been subjected to sexual assault) by way of cross-examination, the judge effectively concluded that the Appellant had waived his right to a fair hearing. The Tribunal in Nwaigwe urged that Tribunals should be very slow to conclude that a party has waived their right to a fair hearing or any part of it. This goes to the Appellant's ability to participate in his own hearing.

25. Further, the judge did not consider abuse of process, that is whether the adjournment request was based on spurious or frivolous grounds or was vexatious in considering whether the Appellant had put forward a good reason for the adjournment request.

26. In a deportation appeal, whether or not the Appellant is represented, the issues at stake are higher than those in other appeals. This too is a factor which the judge should have considered in considering the issue of fairness.

27. Nwaigwe makes clear that there are a number of considerations to be taken into account and I find that the Judge has not done this. He failed to take into account all material considerations, and failed to consider whether the refusal to adjourn would deprive the appellant of his right to a fair hearing. I find that this failure to take into account all material matters and to apply the correct test is a material error of law which has deprived the appellant of a fair hearing.

28. Accordingly, as agreed by the parties before me, this is determinative of the appeal. The parties also agreed that, should I find that the judge erred in refusing the adjournment request, it is appropriate to remit the appeal to the First-tier Tribunal to be heard afresh.

NOTICE OF DECISION

The decision of Judge Howard dated 22 December 2023 contains a material error of law. I set that decision aside in its entirety and remit the appeal to the First-tier Tribunal (Hatton Cross hearing centre) for re-hearing before a Judge other than First-tier Tribunal Judge Howard.

A Grimes

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 August 2024