



**Upper Tribunal
(Immigration and Asylum Chamber)**

ONM (Remittal to FtT with directions) Jamaica [2015] UKUT 517 (IAC)

THE IMMIGRATION ACTS

Heard at Birmingham

On 15 July 2015

**Determination
Promulgated**

.....

Before

**The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Dawson**

Between

ONM

and

Appellant

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Representation:

Appellant: Mr J Wilson of JMW Wilson Solicitors LLP

Respondent: Mr K Norton, Senior Home Office Presenting Officer

- (i) *The power conferred on the Upper Tribunal, exercisable upon remittal to the First-tier Tribunal, by section 12(b)(i) of the Tribunals, Courts*

and Enforcement Act 2007 to give directions is distinct from the power conferred by section 12(3)(b) to give procedural directions.

- (ii) *Directions under section 12(b)(i) encompass matters such as guidance on the law and the scope of the appeal upon remittal. In formulating such directions, the Upper Tribunal must be alert to the jurisdictional limits of the First-tier Tribunal.*
- (iii) *Directions under section 12(3)(b) relate to matters of procedure concerning the conduct of the remitted appeal.*
- (iv) *Both powers are to be exercised in a manner which promotes the interests of justice and gives effect to the overriding objective.*
- (v) *The decision in PF (Nigeria) v SSHD [2015] EWCA Civ 251 does not rule conclusively that the First-tier Tribunal (and, on appeal, the Upper Tribunal) has no jurisdiction to consider a ground of appeal which canvasses the frustration of a substantive legitimate expectation, bearing in mind the “otherwise not in accordance with the law” statutory ground of appeal enshrined in section 84 of the Nationality, Immigration and Asylum Act 2002.*

DECISION AND DIRECTIONS

INTRODUCTION

1. In order to comprehend this decision it is necessary to outline the somewhat chequered and protracted history of this appeal. In summary:
 - (i) The Appellant, who is a national of Jamaica, was the subject of a decision by the Secretary of State for the Home Department (the “*Secretary of State*”), dated 02 September 2011, to make a deportation order against him *qua* foreign criminal under section 32 of the UK Borders Act 2007. Simultaneously, his asylum claim was refused.
 - (ii) By its determination dated 10 February 2012, the First-tier Tribunal (the “*FtT*”) dismissed the Appellant’s ensuing appeal.
 - (iii) Permission to appeal having been granted, there were several listings before the Upper Tribunal and, during this phase, the West Midlands Police (“*WMP*”) became involved as an interested party. This arose out of the Appellant’s quest to acquire certain documents and information from this source. This yielded certain evidence, including the oral testimony of two police officers.
 - (iv) This rather sluggish phase culminated in an order of the Upper Tribunal dated 28 January 2015 setting aside the decision of the FtT for error of law and making further directions.

- (v) This further interlocutory hearing was conducted on 16 July 2015.

APPEAL TO THE FtT

2. The Appellant is a national of Jamaica, aged 42 years. He was lawfully present in the United Kingdom between 2001 and 2003, when his leave to remain expired. This appeal originates in deportation action taken against him by the Secretary of State, in September 2011, precipitated by the Appellant's convictions in respect of certain drugs offences. Previously, in response to the customary "minded to deport" notification, the Appellant had made a human rights and asylum claim. This is described in the ensuing decision notice in these terms:

"Your claim for asylum is based upon your fear that if returned you would face mistreatment due to being a drugs informant in the UK, which you claim is part of a social group in Jamaica. Your claim for humanitarian protection is based upon your fear that you would face unlawful killing if returned to Jamaica

You claim to have acted as an informant from 2006 until 2008, giving information against members of [a named group]. You met [A&B] whom you previously knew in Jamaica who asked you to be a drugs courier for them. You went to the police in the UK for help and gave them information. This led to [CD] being convicted and removed from the UK. You provided information about other individuals too

On the last case you worked on you were set up by the drug gang as they suspected you of being a mole The gang then knew you had been acting as an informant. You were threatened by members of the gang [who] got into your house on one occasion they then beat and raped [your partner] [later] the gang found you and took you to a location where they tortured you for three days They told you that you had to pay off your debt for acting as a police informer by carrying drugs ...

You state that you would be found if returned to Jamaica as it is a small island and [X and Y] run drugs from the airport and nothing would get past them. You state that you could not approach the police in Jamaica as they would not help you ... The people you informed on are either in Jamaica or travel back to Jamaica."

All of the ensuing litigation developments have unfolded against this background.

3. The Secretary of State's decision has the following principal ingredients:
- (a) Drug informants who return to Jamaica do not form part of a specific social group, lacking an immutable social characteristic.

- (b) In any event, there is adequate state protection through the Jamaican Government's Witness Protection Scheme ("WPS").
- (c) The Appellant's bare assertion that protection would not be available from the Jamaican police was disbelieved.
- (d) The Appellant's claim to have acted as a police informant in the United Kingdom was not considered credible.
- (e) He could safely relocate in Jamaica in any event.
- (f) The Appellant had secured atonement, having acted as a drug courier in response to and in compliance with the threat alleged by him, there was no evidence that he was of any enduring interest to those whom he claims to fear.

His claims for humanitarian protection and discretionary leave were also refused.

4. There are striking features of the appeal process conducted by the FtT: the reception of evidence in the form of a letter from the WMP which was undisclosed to any party; the receipt of oral evidence from a WMP police officer in camera; and the receipt of undisclosed evidence from a second police officer in the parties' absence. Acting on the police evidence, the Tribunal found that the Appellant was registered as a covert human intelligence source ("CHIS") by the WMP for a period of 15 months in 2006/2007, receiving certain financial rewards in consideration of the provision of information. It made a further finding that the Appellant's claims about the quantity of information provided by him to the WMP had been "*greatly exaggerated*". This is followed by further findings:

"... We accept the police version as they are under a duty to keep accurate records. We note that there is no suggestion on police records that the Appellant would have been known as an informant. We find that the Appellant, if he wishes to, can keep that former relationship with the police private

There is no suggestion that his involvement with the significant crime for which he was convicted was in any way directly connected to his former role as a police informant. We find that there is no evidence that the people with whom he conspired to supply Class A drugs were persons on whom he had informed."

The Appellant's claim that he was known to be a police informant by a major Jamaican drugs dealer was disbelieved. Ditto his claim about the attack on his partner. The incongruity highlighted in the Secretary of State's decision regarding the Appellant's willingness to reside in the United Kingdom but not Jamaica was adopted. So too was the Secretary of State's assessment of the availability of state protection in Jamaica. The Tribunal also accepted the Secretary of State's assessment of the

availability of internal relocation, considering the Appellant's asserted fear of prosecution to be "*localised to his home area*". His appeal was rejected on all grounds accordingly.

SUBSEQUENT PROCEEDINGS

5. The subsequent course and progress of the Appellant's appeal to this Tribunal are charted in [1] above. At this juncture we draw attention to the grant of permission to appeal to the FtT which contains the following material passages:

"The determination makes no mention that another police officer gave evidence

The officer was unnamed and remained anonymous throughout the hearing. The evidence of this unnamed officer was given only to the panel in the absence of the parties [and] has therefore been hidden from the Appellant [who] was denied any opportunity of cross examining that unnamed witness. Additionally, when [the identified police witness] gave evidence it was in the form of a statement which was read by the panel in private and was not shown to either of the parties."

In summary, permission to appeal was granted on account of the procedurally unfair process whereby the FtT conducted the appeal and made its decision.

6. We have also paid attention to the "*Further Grounds of Appeal*" document. It would appear that this was generated following a change of legal representation. This advances three additional complaints:

(a) The FtT erred in law in accepting unsubstantiated assertions on behalf of the Secretary of State regarding convictions of the Appellant in 2005/2006.

(b) The FtT further erred in law in failing to engage with an important aspect of the Appellant's case, namely that "*... at a meeting with his handler and an immigration official, he had been promised that leave to remain would be granted to him and his family*", the Secretary of State having failed to respond to this assertion.

(c) The FtT committed the further error of law of finding that the WPP would be available to the Appellant in Jamaica, as this does not extend to police informants in the United Kingdom and provides inadequate protection in any event.

7. At a hearing on 28 January 2015 the Upper Tribunal set aside the decision of the FtT. It did so by concession on behalf of the Secretary of State. The FtT's decision was set aside on the basis of the grant of permission to appeal rehearsed in [5] above. It was determined that the case would be remitted to a differently constituted FtT for fresh hearing.

However, the terms of the remittal were not finalised as the Appellant wished to rely upon more extensive grounds. This resulted in the subsequent provision of a submission entitled "Permission to Advance Additional Grounds". The proposed further grounds may be summarised as follows:

- (i) The Secretary of State's assessment that the police would not agree to engaging the Appellant as an informant without first investigating the background is flawed.
- (ii) *"Secondly, the Home Office together with the law enforcement agencies responsible for engaging the Appellant as a CHIS owed him a pre-existing duty of care, by reason of his status, for his well being and safety [which] incorporates an obligation not to send him back to Jamaica ...*
This duty of care is consistent with the duty owed by the Home Office to the Appellant under Articles 2, 3 and 8 ECHR".
- (iii) The enforced return of the Appellant would frustrate a substantive legitimate expectation generated by the promise made to him that in consideration of acting as an informant he *".. would be provided leave to remain in the UK indefinitely or lawfully"*.
- (iv) The proposed enforced return of the Appellant to Jamaica without first conducting a proper risk assessment breaches his rights under Articles 2, 3 and 8 ECHR.
- (v) The application of sections 117A - 117C of the Nationality, Immigration and Asylum Act 2002 (*"the 2002 Act"*) militates against the Appellant's deportation.
- (vi) The deportation order is in breach of the Secretary of State's duties under section 55 of the Borders, Citizenship and Immigration Act 2009 (the *"2009 Act"*).

8. By section 82(3A) (a) and (b) of the Nationality, Immigration and Asylum Act 2002 a decision that section 32(5) of the UK Borders Act 2007 (the *"2007 Act"*) applies is an appealable immigration decision. Under section 84(1) the permitted grounds of appeal include:

"(c) that the decision is unlawful under section 6 of the Human Rights Act 1998 ...

(e) that the decision is otherwise not in accordance with the law ...

[and]

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or

would be unlawful under [section 6](#) of the [Human Rights Act 1998](#) as being incompatible with the appellant's Convention rights."

9. In [1] of the determination of the FtT, it is recorded that the Appellant's appeal was against the Secretary of State's decision dated 02 September 2011 to make a deportation order against him. This is incorrect, as appears from the Secretary of State's Notice of Decision dated 06 September 2011, bearing the title "Decision that section 32(5) of the UK Borders Act 2007 applies". Within the text of the latter the Appellant's asylum claim is considered and rejected. It is clear from the ensuing Notice of Appeal [Form IAFT-1] that the Appellant's challenge was focused mainly on the asylum refusal aspect. In its "Summary of Decisions", the FtT stated, *inter alia*:

"We dismiss the Appellant's appeal against deportation....

We uphold the section 72 certificate in respect of the asylum claim"

This must be considered in the context of the decision of the Secretary of State adverse to the Appellant against which he was appealing. We consider the correct analysis to be the following:

- (a) The Appellant was appealing against a decision that section 32(5) of the 2007 Act applies to him.
- (b) As a result, all of the grounds of appeal listed in section 84(1) and (3) of the 2002 Act were, in principle, available to him. This continues to apply, given that the appeal is to be remitted to the FtT.

10. The next stage in the analysis requires consideration of the Upper Tribunal's powers. These are contained in section 12 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act"). Having already found the decision of the FtT to be vitiated by material error of law, the following provisions apply:

"(2) The Upper Tribunal - ...

(b) ... must either -

- (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or*
- (ii) remake the decision.*

(3) In acting under subsection (2)(b)(i), the Upper Tribunal may also -

- (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;*

(b) *give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.*"

Having already decided that remittal is appropriate, at this stage we are empowered, upon remittal, to give both "*directions*" and "*procedural directions*" to the FtT. We consider that these are the powers engaged by the Appellant's application to advance additional grounds of appeal to the FtT.

11. In our judgment, these powers are to be exercised in a manner which promotes the interests of justice and gives effect to the overriding objective. We consider that the legislature has made a conscious decision between "*directions*" and "*procedural directions*". In our view, the former encompass matters such as guidance on the law and the scope of the appeal upon remittal. This is supported by the statement in Sarkar v SSHD [2014] EWCA Civ 195 that the Upper Tribunal "... has power to give *directions which limit the scope of the reconsideration*" by the FtT: see [15]. In contrast, "*procedural directions*" are clearly directed to matters of procedure, relating to the conduct of the remitted appeal.
12. Having regard to the highly unusual features of this case and given that we find nothing frivolous or vexatious in those additional grounds which are, in principle, viable we propose to exercise our discretion to make directions which will enable the FtT to consider those aspects of the Appellant's challenge to the Secretary of State's decision which it has jurisdiction to determine. We give effect to this approach in the following way, with reference to our summary of the six additional grounds which the Appellant wishes to advance in [7] above:
 - (i) We consider the first proposed additional ground inappropriate for two reasons. First, it does not disclose any arguable material legal defect in the Secretary of State's decisions. Second, it is overtaken in any event by the FtT's finding that the Appellant was an informant (albeit in considerably narrower terms than he would wish) and the reality that there is no longer any challenge to this fact on behalf of the Secretary of State.
 - (ii) We reject the second of the proposed additional grounds for the fundamental reason that the FtT is not empowered to consider and determine a claim by the Appellant that the Secretary of State owed him a duty of care and, in making the impugned decisions, has acted in breach thereof. This is a claim which, in our estimation, can be pursued by the Appellant only by a private law action against the Secretary of State based on torts such as negligence and misfeasance in public office. These lie outwith the jurisdictional remit of the FtT.
 - (iii) We permit the Appellant to advance his substantive legitimate expectation ground since, in our judgment, it is at least arguable that an immigration decision which frustrates a substantive

legitimate expectation is embraced by the “*otherwise not in accordance with the law*” statutory ground of appeal enshrined in section 84(1)(e) of the 2002 Act. In thus deciding we acknowledge the decision of the Court of Appeal in PF (Nigeria) v SSHD [2015] EWCA Civ 251. It is unnecessary for us to decide whether that decision imposes a blanket prohibition on the canvassing of a substantive legitimate expectation upon appeal to the FtT, restricting such challenge exclusively to an application for judicial review: [32]-[34] of the judgment suggest otherwise. The alternative construction of the Court of Appeal’s decision may be that in that particular case the decision of the FtT could not have erred in law on this ground since this was not one of the Appellant’s original grounds of appeal. We are mindful that the “*otherwise not in accordance with the law*” statutory provision does not feature in the decision of the Court of Appeal. Furthermore, the Secretary of State’s decisions belong to the realm of public law (Bugdacey v SSHD [1987] AC 514, at 522-533) wherein reposes the doctrine of substantive legitimate expectations. We confine ourselves to these observations, while acknowledging that further consideration of this issue by the Upper Tribunal and the Court of Appeal will probably be required.

- (iv)& (v) We grant the Appellant’s application to extend his grounds of appeal to encompass asserted infringements of Articles 2, 3 and 8 ECHR, without further prescription, save to emphasise what we have said in (ii) above.
- (vi) The Appellant’s grounds may also be extended to incorporate an asserted breach of section 55 of the 2009 Act.

DECISION AND DIRECTIONS

13. We decide and direct as follows:
- (i) This appeal is hereby remitted to a differently constituted FtT for the purpose of a fresh hearing and decision.
 - (ii) We preserve none of the findings contained in the determination of the FtT promulgated on 15 February 2012. In thus deciding, we draw attention to the evolution in the Secretary of State’s position noted in [12](i) above.
 - (iii) The Appellant’s solicitors will serve on the Respondent a new grounds of appeal pleading, together with a new indexed and paginated appeal bundle and a draft statement of agreed facts on and file same with the FtT not later than 01 September 2015.
 - (iv) The Appellant’s skeleton argument for hearing will be served and filed not later than 01 October 2015.

- (v) The Respondent's replying skeleton argument and response to the Appellant's draft statement of agreed facts will be served and filed not later than 01 November 2015.
 - (vi) The listing before the FtT will proceed on the first available date thereafter, with expedition highly desirable.
14. We conclude with the observation that, upon remittal, issues relating to the FtT's newly acquired power under Rule 13 of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2015 could conceivably arise. By this Rule the FtT is empowered to prohibit the disclosure or publication of documents and information. There are sundry kindred powers. We are aware that by its decision of 31 July 2015 the Administrative Court has acceded to the application by the Immigration Law Practitioners Association for permission to challenge this rule by judicial review: see [2015] EWHC 2297 (Admin).
15. Given the unusual features of this case and the potential for further difficult legal and procedural issues arising, the Secretary of State should give careful consideration to instructing Counsel.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 08 August 2015