



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

Appeal Number: HU/15692/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 14 March 2019

Decision & Reasons Promulgated
on 18 March 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Drummond Miller,
Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The respondent decided on 21 June 2016 to deport the appellant.
2. FtT Judge Farrelly heard the appellant's appeal on 12 December 2017, and dismissed it by a decision promulgated to the parties on 26 March 2018.
3. The appellant based his case on his relationship, or possible future relationship, with his daughter E, who was then the subject of adoption proceedings. At the time of the FtT hearing, he was challenging the order freeing E for adoption in appeal proceedings.

4. The grounds of appeal to the UT state at paragraph 1:

“On 9 March 2018 the Inner House of the Court of Session allowed the appellant’s appeal and remitted the matter [to the Sheriff Court] for further consideration. On 21 March 2018 that decision was drawn to the attention of [Judge Farrelly] by letter and fax from the appellant’s agents. The judge therefore had evidence before him that the appeal was at least ongoing with the prospect of success ... The failure of the judge to make any reference to the opinion of the Inner House was to leave out of account relevant matters and ... to err in law.”
5. UT Judge McWilliam granted permission on 26 July 2018:

“The judge was of the view that there was *“nothing which would suggest to me an outcome contrary to the social worker guidance of adoption and severing of close contact with the appellant”* and it is arguable he attached significance to this. In light of the appellant’s serious offending and failure to take responsibility and inability to meet the requirements of the immigration rules, it may make no difference to the outcome; however, I cannot rule out that had the judge considered the pre-decision evidence it is possible he would have concluded that there were compelling circumstances.”
6. Mr Caskie advised the further developments which took place in relation to the adoption of E. It is sufficient to say that further proceedings took place in England, which reached their final resolution when the appellant was refused permission to appeal on 4 March 2019.
7. It was common ground between the parties that despite the wording of the ground of appeal to the UT, quoted above, it was highly likely (I should think practically certain) that the Court of Session decision did not come to attention of Judge Farrelly before he sent his decision to the tribunal’s administration to be promulgated. That also appears to be the case so far as can be discovered from the paper file before me.
8. Mr Caskie submitted, and I accept, that procedural fairness, amounting constructively to error of law, may occur through no fault of a judge, where an administrative mishap has resulted in a decision being made in ignorance of evidence submitted by a party. The most usual instance is a decision made “on the papers”, without evidence submitted timeously by an appellant having been placed on the file. I accept that such unfairness might occur even where evidence is submitted after a hearing has taken place, but before a decision has been issued.
9. Mr Caskie said that the point was one of principle, so it does not matter if the further evidence was received only one moment before a decision was issued. Mr Matthew said the question was one of fact and timing, and the present case did not show any procedural shortcoming by the FtT.
10. I consider that a question of fairness can only be resolved by reference to the facts. There is no overriding rule that in fairness any new matter must be taken into account in a decision, no matter how late it is raised, subject only to that being before the decision is issued.

11. Unfairness does not arise from materials not being considered when these are submitted at a stage when the decision is already administratively on its way to being issued. An appellant cannot reasonably expect a tribunal to stand ready to interrupt the normal course of events up to the last moment.
12. The appellant may have felt that his timing was unlucky, but not that he was unfairly treated, on receipt of a decision which did not take his communication of 21 March into account. There was no procedural or administrative shortcoming within the FtT.
13. I am fortified in that view by noting that the decision of the Inner House was made on 9 March. No explanation was advanced for not communicating it to the FtT until 21 March.
14. Even if the appellant had shown a procedural mishap such as to amount to unfairness, that would not have justified the decision of the FtT being set aside.
15. Mr Caskie accepted that the appellant could not hope to succeed in a remaking of the decision by reference to the child E. He said that circumstances have evolved, such that the appellant now has a case to make by reference to another child, capable of showing very compelling circumstances; if not able to take these proceedings any further, the appellant would make further submissions, leading inevitably either to the Court of Session on judicial review, or to another appeal to the FtT; and based on "procedure rule two", matters should be resolved in these proceedings.
16. That was an ingenious submission, but it is not well-founded.
17. Paragraph 2 of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008 sets out the overriding objective of dealing with cases fairly and justly, and includes the avoidance of delay. That relates to proceedings within the UT. It does not empower the UT to bypass the making of applications to the respondent and the respondent's decision-making.
18. The aspect of the appeal on which error was alleged has since been extinguished. An error going to that aspect would not justify setting the decision aside to enable the appellant to develop a new case, either in the FtT or in the UT.
19. I do not have to consider whether anything outlined had the potential of showing "very compelling circumstances" as required by the rules and by section 117C of the 2002 Act.
20. The decision of the First-tier Tribunal shall stand.
21. The FtT did not make an anonymity direction, and the matter was not addressed in the UT. However, I consider that the underlying circumstances are such that a direction is appropriate.

22. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A handwritten signature in black ink that reads "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

14 March 2019
UT Judge Macleman