



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

Appeal Number: PA/05671/2019

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice Centre**  
**On 21 February 2020**

**Decision & Reasons Promulgated**

**On 16 March 2020**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**MA  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Dr S Chelvan, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant is a citizen of Nigeria who has appealed against a decision of the First-tier Tribunal ('FtT'), dated 24 May 2019, in which his appeal was refused on human rights and asylum grounds.

2. I have maintained the anonymity direction made by the FtT as this decision refers to the appellant's minor children and family court proceedings relating to them.

### **Background and procedural history**

3. The appellant entered the United Kingdom ('UK') in 2013 as a visitor. He was arrested on 24 December 2015 as an overstayer and served with a removal decision. He was convicted of possession of identity documents with intent, possession of articles for use in fraud and possession of obtaining another person's identity document and sentenced by the same court on 29 January 2016 to a total of twelve months' imprisonment made up of three different sentences.
4. A decision to deport was made on 9 February 2016 and the appellant submitted a human rights claim together with an asylum claim.
5. In a decision dated 24 May 2019 the respondent refused the appellant's human rights and protection claim.
6. The appellant appealed against that decision to the First-tier Tribunal (FtT). He relied upon his fear of persecution in Nigeria but I do not need to say anything more about that for the purposes of this decision.
7. As far as Article 8 was concerned, he relied upon his relationship with four children. Those four children are specified in correspondence and I refer to them as 'A' born in May 2011, 'B' born in June 2016, 'C' born in July 2016 and 'D' born in December 2018. Each child has a different mother. The appellant claimed that he had a genuine and subsisting relationship with each child and it would breach his Article 8 rights to be deported. The respondent's decision letter clearly and unambiguously disputed the claim that the appellant had genuine and subsisting relationships with any of his children. It was with this in mind that when the FtT hearing was first listed in July 2019 that the appellant successfully obtained an adjournment in order to provide information from family court proceedings in relation to one of the children and an independent social worker report, in relation to all the children.
8. The procedural history that followed that initial adjournment is lengthy and complicated but I do not need to go into it in any detail, save to say that the matter was listed to be heard by the FtT on 15 November 2019. The appellant has been represented by solicitors throughout these proceedings. They applied for an adjournment of that hearing on 12 November 2019. In their written application the solicitors clarified that the family court had not responded to their request for permission for disclosure and the independent social worker report would not be available until 3 December. They also added that they were waiting on a country expert report. On 13

November the Tribunal refused the adjournment request and said this.

“The decision in this case was taken in May 2019. This case has been adjourned on a number of occasions. The Tribunal fails to see what can be assisted by an expert report. With regard to contact the appellant can give evidence on contact. The Family Court has decided the best interests are for the appellant to have contact. The judge can determine in light of that whether the deportation order should stand. Application refused”.

9. On 14 November 2019 the appellant’s solicitors sent a letter before action to the First-tier Tribunal again asking that the matter be adjourned. On 14 November 2019 the FtT responded to that application in this way:

“The Designated Judge Mr McClure maintains his position and the appeal remains listed for tomorrow 15 November 2019. The appellant can give evidence about the contact he has with his child. If the appeal goes ahead and the appellant is not satisfied with the decision he can appeal to the Upper Tribunal”.

The hearing went ahead on 15 November 2019, before FtT Judge McAll. At that hearing the appellant did not attend, and neither did his solicitors. The FtT noted that there had been an adjournment application on the papers and issued a further, more detailed decision comprised of some 21 paragraphs in which the application for an adjournment was again refused. That must be read together with a separate decision refusing the substantive aspect of the appeal, that is the asylum appeal and the human rights appeal.

10. The appellant’s solicitors challenged the initial decision to refuse the adjournment by way of judicial review. That came before Judge Kopieczek on 15 November 2019 and he refused the application for interim relief to prevent the FtT from promulgating its decision. This was renewed at an oral hearing before Judge Stephen Smith at a hearing on 25 November 2019 and he said this:

“1. This is a renewed application for interim relief and order preventing the respondent from promulgating a decision and reasons in the applicant’s appeal against the Secretary of State for the Home Department’s decision to deport him to Nigeria pending the provision and admission of linked documents from the Family Court and to enable the applicant to obtain an independent social worker’s report in relation to the impact of his deportation on the children involved in the case. The respondent heard a substantive appeal against the deportation order on 15 November 2019. The respondent refused to adjourn these proceedings in order to obtain the documents set out above. A separate application for judicial review has been brought in relation to that decision. Mr Bazini submitted ‘unless I grant interim relief in the terms sought that application for judicial review will be rendered academic’.

2. Permission was refused on the papers by Upper Tribunal Judge Kopieczek on 15 November 2019 in these terms.

‘Having considered the grant in support of the application for interim relief and the grounds in support of the judicial review claim as well as the reasons given by the respondent for refusing to adjourn the hearing I am not satisfied that a grant of interim relief is merited. The First-tier Tribunal is seized of the appeal which has now been heard. The appropriate course is to await the outcome of the appeal and seek permission to appeal to the Upper Tribunal if there is dissatisfaction with its decision’.

3. I entirely agree with and adopt the reasons given by Judge Kopieczek for refusing the application for interim relief on the papers. The applicant has an alternative remedy available to him namely an application for permission to appeal to the Upper Tribunal against the First-tier Tribunal’s consideration of his appeal. Judicial review is an exceptional jurisdiction to be used where there is no alternative remedy. In the present matter there is an alternative remedy. Under the circumstances therefore there is no reason for me to exercise my discretion to take the exceptional and highly unusual step of prohibiting the First-tier Tribunal from promulgating a decision in an appeal that has already been heard. Decisions on adjournment and other interlocutory matters are excluded decisions for the purposes of the Tribunal, Courts and Enforcement Act 2007 Section 11(1) see Article 3N of the Appeals (Excluded Decisions) Order 2009. Parliament has decided therefore that satellite litigation of this sort is not to contaminate proceedings before the First-tier Tribunal. Whilst I do not rule out the possibility that in some exceptional cases relief of this sort may be appropriate this is not one of those cases”.

11. The FtT’s decisions refusing the adjournment and dismissing the appeal were both promulgated on 27 November 2019.
12. In grounds of appeal dated 11 December 2019 it was submitted on the appellant’s behalf that the FtT materially erred in refusing the application to adjourn the proceedings pending the disclosure from the Family Court with respect to the contact between the appellant and one of his children.
13. Permission to appeal was granted by FtT Judge Bulpitt in a decision dated 30 December 2019. This included the following observation:

“There are a number of unanswered questions which arise from the application for permission to appeal. These include why the appellant and his representatives did not attend the hearing and why there was a delay between the Family Court making an order permitting disclosure of documents on 29 October 2019 and the disclosure of those documents. Notwithstanding these questions and the judge’s careful and detailed decision to refuse the adjournment request it is arguable that the decision to refuse the application to adjourn knowing that the independent social worker’s report was due to be completed on 3 December 2019 and as an application to the Family Court was

outstanding deprived the appellant of a fair hearing and amounted to procedural unfairness.”

14. There has been no respondent’s notice in this appeal. The appellant has however provided a skeleton argument which has attached to it witness statements from the solicitors with conduct of this appeal and relevant exhibits to that statement.

## **Submissions**

15. At the hearing before me Dr Chelvan, who appeared on behalf of the appellant, and who also drafted the grounds of appeal but who did not appear in the judicial review oral application said that he had had an opportunity to discuss the matter with Mr McVeety, the Senior Home Office Presenting Officer representing the respondent and that Mr McVeety agreed that the FtT acted unfairly in the particular circumstances of this case by not adjourning the appeal when the evidence from the family court was imminent and was directly relevant to one of the disputed matters in the appeal.
16. I was concerned that the appellant and his solicitors made a number of regrettable decisions and may have contributed to an unsatisfactory state of affairs by the time the matter came before Judge McCall on 15 November 2019. I therefore gave Mr McVeety time to reflect on his concession. Having done so, Mr McVeety made it clear that there the appeal had been poorly conducted on the part of the appellant and his solicitors in certain respects, but that when he stood back and considered the matter holistically, the respondent accepted it was unfair not to adjourn the hearing. He highlighted that the decision letter made it very clear that the respondent was of the view that this appellant had no contact whatsoever with his children and in those circumstances this was one of those rare cases where there needed to be independent evidence of contact.

## **Error of law discussion**

17. In many deportation cases, where a relationship between the foreign national parent and child is relied upon, the respondent often concedes a genuine and subsisting parental relationship. As Mr McVeety observed, what is more often in dispute is the impact of the separation of the parent from the child, upon that child and whether it reaches the high threshold required by the ‘unduly harsh’ test. This is not one of those cases, or at least at the time of the FtT hearing it was not one of those cases – the respondent disputed the appellant’s claim to have any relationship with any of his children. Indeed, Judge McCall specifically observed there was no supporting evidence of contact between the appellant and his children and found an absence of any genuine parental relationship.

18. Mr McVeety pointed out that it should have been clear to the FtT that independent evidence supporting the appellant's claimed relationships with his children had been requested and would be available shortly after 15 November 2019. Indeed, the family court documents were disclosed on 22 November 2019 and the ISW report is dated 3 December 2019. In these circumstances, I reluctantly accepted the concession on behalf of the SSHD that the FtT acted unfairly in failing to adjourn the hearing. That reasons for that reluctance were made clear to Dr Chelvan, and I gave him an opportunity to address me before making the observations I now do.

## Observations

19. Given my decision that the FtT erred in law in not adjourning the hearing as conceded by the respondent in this case, I strictly speaking do not need to say anything else, save that the matter needs to be considered by the FtT at a de novo hearing. However, it is important that I make some brief observations for the appellant and his legal representatives to reflect upon.
20. The first relates to the detail contained in the adjournment application on the papers. When refusing the adjournment application in a detailed written decision, Judge McAll drew attention to certain omissions and inadequacies within the application - see paragraphs 12 to 13 of the adjournment decision. I agree that the written application could have been more detailed and more helpful. It would have been helpful to explain why there was no other type of evidence that could be provided in the interim. For example, supporting evidence from one or more of the mothers and why it was actually necessary for that family court order to be seen. The FtT Judge also pointed out that he was not told why there had been a delay in the ISW's report and it would have been helpful to have been provided with a reason for that or even a letter from the ISW explaining the reason for the delay and / or a summary of the ISW's conclusion, that could have taken the form of a short email.
21. The second and perhaps much more significant matter of concern is the appellant's failure to attend the hearing on 15 November 2019. I invited Dr Chelvan to take instructions on whether with the benefit of hindsight, it was accepted that the appellant should have attended the hearing. His response to this was that the solicitors stood firm by their position that the appellant was entitled to not attend that hearing and that they were "*proved right*". This is a regrettable position to adopt and very concerning indeed.
22. It is well established, and I do not need to refer to the authorities, that where an application is made on the papers the Tribunal or the appropriate court is always willing to reconsider that application when it is put orally on the day of the hearing. This includes applications for adjournment from litigants in person, if that is what the appellant

would have been because the appellant's solicitors claim they would not have been able to attend in good faith bearing in the mind legal aid limitations. As Judge McAll observed at paragraph 15 of the adjournment decision, this appellant was educated to degree level and clearly articulate enough to be able to advance his position out of respect to the Tribunal in person, orally. By simply failing to attend he not only showed the Tribunal discourtesy but he also gave the Tribunal the impression that he was not as willing to assist the Tribunal as he might in fact have been. In cases such as these, it is important that where applications are refused on the papers, every effort must be made to attend the oral hearing, and if appropriate renew the application. It is wholly wrong to assume or proceed on the basis that the Tribunal will not be persuaded by a renewed oral application.

23. Dr Chelvan submitted that the decision of the FtT demonstrates that the appellant's attendance would have made no difference. I entirely disagree. The decision of the FtT demonstrates that it was concerned by the very fact that the appellant did not attend the hearing and that was a factor that the FtT was entitled to take into account when refusing the adjournment. In this respect the representatives have not been "*proved right*". I have reluctantly found that notwithstanding the appellant's failure to attend, there was an error of law. I have already indicated nonetheless there was enough on the papers in the unusual facts of this case because of the level of dispute between the parties at the time that necessitated an adjournment. However, much public expense (the appellant is legally aided) has been expended in this case that could have been entirely avoided if the appellant attended in person to explain that the ISW report would be available shortly and so forth. This hearing and the use of public funds in relation to judicial review applications may have well been avoided if the appellant had attended the hearing and been successful in applying for an adjournment.
24. The third and final concern that I have is in relation to judicial review proceedings being undertaken in a case such as this. I have therefore included the decision of Judge Stephen Smith in full. This explains the position properly and I do not need to say anything further about it.
25. These concerns are made simply as observations in order for all concerned to reflect upon them, they in no way mean that the re-hearing of this appeal before the FtT should be in any way affected. These observations are offered so that the legal representatives involved can pause to reconsider the most appropriate course of action, should these matters arise again in the future.

## **Disposal**

26. For the reasons that I have already given but particularly bearing in mind the concession made by Mr McVeety that there was unfairness

in the particular facts of this case, I allow the appellant's appeal. The matter will be remitted to the FtT to be re-decided de novo to be heard by a judge other than Judge McAll.

27. As this matter is remitted, it will be case-managed by the FtT. However, Dr Chelvan raised the prospect of further adjournments to obtain disclosure from the family court in relation to other children. Given that there is now an ISW report, I queried the necessity of this. Both parties agreed that the evidential landscape has evolved and it would assist the FtT for the following agreed directions to be made, after which the FtT could consider listing a directions hearing or final hearing, as considered appropriate.

- (1) The appellant shall file and serve a schedule describing the nature and extent of contact he has with each of his children, attaching to that a paginated and indexed bundle of all evidence relied upon in relation to his claimed relationships with his children before 11 March 2020.
- (2) The respondent shall file and serve a position statement clarifying whether or not she accepts the claimed contact and the appellant's claim to have a genuine parental relationship with each of his children, before 25 March 2020.

## **Decision**

28. The two decisions of the FtT contain errors of law and are set aside.

## **Direction regarding anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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.

Signed: *UTJ Plimmer*

Dated: 5 March 2020

Upper Tribunal Judge Plimmer