



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

Appeal Number: DA/02333/2013

THE IMMIGRATION ACTS

Heard at Manchester Crown Court

**Determination
Promulgated**

On 10 May 2014

On 15th May 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

MR PAUL WAYNE STEPHENSON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representative, in person

For the Respondent: Sarah Marsh, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant who is a citizen of Jamaica born 29 January 1975 appeals with permission the decision of First-tier Tribunal Judge Foudy and Mrs S A Hussain JP (the panel) who dismissed the appellant's appeal against the decision dated 11 November 2013 whereby pursuant to s.32 of the UK Borders Act 2007 the respondent made a deportation order on the basis of the appellant being a foreign criminal as defined by s.32(1) and that his removal under s.32(4) was conducive to the public good for the purposes of s.3(5)(a) of the Immigration Act 1971.

2. This followed the appellant's conviction by a jury of wounding with intent and criminal damage on dates in January 2011 for which the court ordered a custodial sentence of eight years' imprisonment and an extended sentence of thirteen years under s.227 of the Criminal Justice Act 2003 so as to include an extension a period of five years in addition to the custodial term, applying the provisions of chapter 6 of the Criminal Justice Act 2013.
3. The appellant advanced a number of grounds in his appeal to the First-tier Tribunal; in essence he relied on Article 8 of the Human Rights Convention in that the Secretary of State had failed to take into consideration the potential indefinite ban on return, the proportionality of the effect on the appellant's family and that there were no issues or public protection (concerns) which warranted deportation. The appellant had been on bail in the community without further convictions or misbehaviour. Reference was made to "the parties" being in a genuine and subsisting relationship with adequate accommodation and maintenance and intention to live together.
4. The appeal was listed for hearing on 4 February 2014. The appellant was not produced and the panel heard no evidence. They nevertheless proceeded and after submissions from a Home Office Presenting Officer reserved their decision. The judge's determination is dated 5 February 2014. She found that the appellant may well be the biological father of British children (it was his case that there were five) but concluded in the absence of evidence from any witnesses that no "practical family life actually exists between the appellant and any of the children." The panel concluded that the appellant's:

"... deportation will therefore have little impact on the welfare of the children or their best interests, as the appellant is a father to them in name only. The appellant has presented no evidence that he even begins to suggest that there are any exceptional circumstances in his private life to outweigh the presumption in favour of this deportation."

And thus, the panel dismissed the appeal.

5. The court file indicates that the panel had before them, in addition to the reasons letter from the Secretary of State and the grounds of appeal,
 - (i) A letter from Dawn Roberts referring to their daughter who also provided a letter referring to her age as 9 years old.
 - (ii) A NOMS 1 form.
 - (iii) A record of prison visits, a Home Office questionnaire completed by the appellant.
 - (iv) A copy of the order for imprisonment and the sentencing judge's remarks.

- (v) A letter dated 13 January 2013 from Sarah Howell in support of the appellant. It refers to the anticipated hearing on 4 February 2014 and the absence of financial support for the solicitor's fees to be met. She attaches her birth certificate and one for a child born 17 January 2010 recording the appellant as the father. The explanation is given that the appellant was appealing because he has children in the United Kingdom whose life he wants to be part of and that he wants to start a life with Ms Howell and his son.
- (vi) A letter from the appellant dated 22 January 2014 giving his address as HMP Risley. This refers to the important role the appellant plays in the life of his children, his employment as a chef and to his temperament as mild-mannered with no intention of hurting anyone.

I observe in respect of the letter of 22 January 2014 that this is placed on the court file after the Record of Proceedings and there is the possibility it was not before the panel.

6. In his application for permission to appeal, the appellant refers to the prison where he is staying not having taken him to the appeal hearing where he could have spoken on his own behalf. He refers to the presence in the United Kingdom of five children and the private and family life which he has established. He has relationships with all mothers of those children and with the children themselves. He refers to s.55, the case of *ZH (Tanzania)* and emphasises his affection for the children as well as his rehabilitation. He describes himself to have a mild-mannered temperament and that he never intended hurting anyone at any time. He expresses remorse and regret that it has taken incarceration for him to see a different path and problem solving.
7. In granting permission to appeal Designated First-tier Tribunal Judge Philips considered it was arguable that it is a fundamental principle of justice that an appellant should at least have the opportunity to be heard. It was further arguable that the panel failed to have regard to Rule 19 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 there being no explanation in the determination why the panel proceeded with the hearing when the appellant was not produced. It was difficult to understand what justification there could be in proceeding.
8. I have noted a legible Record of Proceedings with the opening note "had not been produced." A letter from Peer and Co dated 19 December 2013 indicates that they were no longer representing Mr Stephenson and gave his address as HMP Risley. A pro forma document on the letterhead of Immigration and Asylum Chamber indicates an instruction for the appellant's production on 4 February.
9. The appellant was produced at the hearing before me and sought an adjournment. He explained that his legal representatives, BHB Law Solicitors who had been instructed on 28 April were unable to represent him due to lack of time and instructions although it emerged that the

underlying reason was a lack of funds which were being put in place by his mother and “baby mothers.” I refused the application because Peer & Co had stepped down as his representatives in January because of lack of funding; there was no evidence from any of the parties who were said to be providing funding and they were not present at the hearing. There was, as submitted by Miss Marsh, too much uncertainty. She also observed in her submissions that were the matter to proceed before me today it would not be to the appellant’s detriment.

10. I explained to the appellant the basis on which the appeal had come before me. He understood my task was to decide whether the First-tier Tribunal had made an error of law and if so whether it required the decision to be set aside. A further consideration were I to do so would be whether I should re-make that decision or whether the case be remitted to the First-tier Tribunal. I observed to Miss Marsh that on the face of it it appeared that the First-tier Tribunal had not considered Rule 19(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005:

“Hearing appeal in absence of a party

- (1) The Tribunal may hear an appeal in the absence of a party or a representative, if satisfied that
 - (a) the party or his representative has been given notice of the date, time and place of the hearing, and
 - (b) there is no good reason for such absence.”

11. The panel was clearly aware that the appellant was detained despite the suggestion otherwise in the grounds of appeal to the FtT in the light of the endorsement on the Record of Proceedings I have referred to above. The file also includes what appears to be part of a production order process. There was no indication before the panel that the appellant had chosen not to attend.
12. Miss Marsh candidly accepted that the panel had not asked itself why the appellant had not been produced. The appeal had been listed in the Manchester Piccadilly Hearing Centre where there were no facilities for appellants serving custodial sentences and thus he could not be produced. It had been noted at an earlier Case Management Review that the case would need to be listed at Manchester Crown Court but it appears that had not been arranged. She accepted that because the appellant was unable to attend his hearing it was un-manifestly unfair. She accepted that the decision must be set aside and the appellant given a proper opportunity to put his case.
13. Miss Marsh was correct to make these candid submissions. It is axiomatic that an appellant has a right to be heard. As observed by the Upper Tribunal in *MM (Unfairness; E & R) Sudan [2014] UKUT 105 (IAC)* at [14]:

“The matrix of this appeal, rehearsed above, prompts reflections on the content in reach of one of the cornerstones of the common law, namely the right of every litigant to a fair hearing. The right in play is properly described as fundamental, irreducible and inalienable.”

14. As to whether the decision should be re-made in the Upper Tribunal or remitted to the First-tier Tribunal, the Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal provides the answer at [7.2]:

“The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or ...”

15. Further, the Tribunal in *MM (Unfairness; E & R) Sudan* concluded at [26]


“By s.12 of the 2007 Act, where the Upper Tribunal concludes that the decision of the First-tier Tribunal involved the making of an error on a point of law and decides to set the decision aside, it must either remit the case to the First-tier Tribunal or re-make the decision itself. We consider that, as a fairly strong general rule, where a first instance decision is set aside on a basis of an error of law involving the deprivation of the appellant’s right to a fair hearing, the appropriate course will be to remit to a newly constituted First-tier Tribunal for a fresh hearing. This is so because the common law right to a fair hearing is generally considered to rank as a right of constitutional importance and it is preferable that the litigant’s statutory right of appeal to the Upper Tribunal should be triggered only where the former right has been fully enjoyed.”

16. I do not consider that having regard to the nature of the error, it is necessary or indeed desirable to consider the merits of the appellant’s case. As observed by Moses LJ in *ML (Nigeria) v SSHD [2013] EWCA Civ 844* at [14]:

“... In my view it would be wrong to consider the chances of success that the claimant might have a second time round. I am perfectly prepared, as a matter of hypothesis, to assume that he will have a very difficult run on a further occasion. But that cannot displace the obligation for the procedure to provide him with a fair opportunity of deploying his case. It is, after all, the reputation of the courts, and the courts in relation to immigration, which is at stake here. It seems to me that they cannot be preserved and protected as to serve and respect if a decision which is so flawed is allowed to stand.”

17. I consider that the decision by the First-tier Tribunal to proceed in the absence of the appellant without good reason so fundamentally undermined the appellant's rights. Regardless of the merits of his case, he must be given the opportunity of arguing that case before a differently constituted panel of the First-tier Tribunal. On that basis this appeal is allowed and the case remitted to the First-tier Tribunal for hearing by a differently constituted panel.

Signed

A handwritten signature in blue ink, appearing to read 'Dawson', with a long horizontal flourish extending to the right.

Upper Tribunal Judge Dawson

Date 15 May 2014