



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

Appeal Number: DA/00322/2014

THE IMMIGRATION ACTS

Heard at Field House

On 8 May 2015

**Decision & Reasons
Promulgated
On 22 May 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**IZZAD MIAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sellwood, Counsel, instructed by Machanda & Co
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Moore promulgated on 25 September 2014 in which he dismissed the appellant's appeal against the respondent's decision of 5 May 2014 to make a deportation order against him.

2. The appellant did not attend the hearing before Judge Moore but was represented by Counsel. An application for an adjournment was made on the basis that the appellant was unable to attend for health reasons, having had to attend the Accident And Emergency Department at Newham Hospital who had referred him to his GP.
3. The appellant's wife and children did not attend the hearing either, it being explained to the judge that there was in place a Family Court order, due to expiry on 17 September 2014, which made contacting them difficult.
4. The respondent objected to the adjournment and Judge Moore refused the application to adjourn the hearing concluding [8] that there was no reliable evidence that the appellant could not attend the hearing because he was unfit to do so and that no members of his family were at the hearing to support his claim for the hearing to be adjourned; that he would have expected the family to attend to support the application to adjourn [9] and for the family to provide comprehensive witness statements. The judge concluded

"I am satisfied that the appellant for his own reasons has chosen not to attend this hearing. I do not propose to further adjourn this hearing, but even if I was to do so, there is no reasonably likelihood that this appellant and/or members of his family would attend any future hearing. I am satisfied that it would not be unjust to proceed with the hearing and that any further delay would be unwarranted. I am satisfied that it is in the interests of justice that this matter should proceed and accordingly I informed both legal representatives."

5. Mr Dhanji who represented the appellant below withdrew at this point as he was without instructions to proceed in the appellant's absence.
6. The judge went on to consider the appeal, after hearing submissions from the respondent. He concluded, materially, [31] that the appellant did not have a family life with his spouse or with his children and thus could not meet the exceptions set out in paragraph 399 of the Immigration Rules.
7. The appellant sought permission to appeal on the basis that the judge:-
 - (i) had failed to identify and apply the correct test and/or provide sufficient reasons as to why the appellant could have a fair hearing in his absence;
 - (ii) had failed to resolve one of the arguments advanced in support of the application, the judge failing to address the difficulties the appellant faced in obtaining evidence from members of his family, there being in place until 17 September 2014 a Family Court preventing him from any contact with his wife or children despite the fact that they wished to reconcile and support his appeal;

(iii) had failed to give sufficient weight to the hospital discharge summary.

8. On 18 December 2014 Upper Tribunal Judge Storey granted permission stating:-

“It is arguable that the FFTJ’s consideration of whether the appellant would be deprived from a fair hearing by the case proceeding in its absence failed to address adequately the medical and family circumstances. The case will be listed with a time estimate intended to ensure time for the decision to be remade if it is found that the judge materially erred in law and both sets of representatives should prepare on that basis.”

9. I heard submissions from both parties. Mr Sellwood was aware of the relevant Family Court order and, although it had expired, was unwilling to produce it, the explanation being that the Family Court Rules prohibit the production of its orders and similar documents, without permission of the Family Court. Mr Sellwood did, however, explain that he had already sent a copy of this to Mr Whitwell. No proper explanation was given for the failure to approach the relevant Court for directions permitting disclosure of what was clearly a relevant and vital document. The appellant’s representatives have had ample time to obtain such permission. It is wholly unacceptable to place the Upper Tribunal in a position where it is being asked to reach conclusions about a document not produced to it.

10. I am, however, satisfied by what both representatives told me, that the order from the Family Court did prevent the appellant from contacting his wife and their children directly. It also appears from the hearing notes kept by Judge Moore that the order and the summary of its effect was put to him but it is unclear from the whether he was shown a copy of the order.

11. The judge’s observations about the failure of the family to attend, and the absence of reasons for this, give no indication that he took into account the explanation that there was in place, until 17 September 2014, a court order preventing contact between the appellant, his wife and their children. Such an order would inevitably cause significant difficulties in communicating any ability to attend or when the hearing was due to take place. It may well be that the judge did not properly appreciate the significance of the order; it may well be that it was not sufficiently brought to his attention by Counsel but it is nonetheless evident that the judge did not take the difficulties caused by the order, or its existence, into account when concluding that he should not adjourn the appeal. Indeed, he drew significant inferences adverse to the appellant's case from the failure of the family to attend and support and reached conclusions about a lack of family life between the appellant and his wife and children.

12. There is less merit in the submissions that the judge failed properly to have regard to the medical evidence adduced. The judge was aware from

the records on file that the appellant had had a heart attack after the Case Management Review which had taken place in March. It appears that the appellant had been hospitalised again on 12 August 2014 and discharged and that he was again taken into hospital on 13 September 2014. In neither case does there appear to have been a letter from a GP or any other doctor stating that the appellant was unfit to attend the hearing. Whilst in the circumstances it may have been open to the judge to proceed with the hearing in the appellant's absence, this cannot be taken in isolation from the difficulties set out above. I consider that in failing to take into account the reason given for the non-attendance by the family, that the judge permitted a procedural unfairness capable of amounting to an error of law in that, when considering whether to adjourn the matter, he did not consider whether the difficulties caused by the court order had prevented the family from attending court.

13. I am satisfied that this error was material in that it is evident now that the appellant's wife and children, who attended court as did the appellant, when the matter came before me, can support his case.
14. In the circumstances, as there will now have to be fresh findings of fact on all material issues, I consider that the appropriate course of action is to remit this matter to the First-tier Tribunal for a fresh decision on all issues.

SUMMARY OF CONCLUSIONS

- 1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- 2 I remit the appeal to the First-tier Tribunal for a fresh decision. For the avoidance of doubt, none of the findings made by First-tier Tribunal Judge Moore are preserved.

Signed

Date

Upper Tribunal Judge Rintoul