IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00891/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 23 February 2015	**On 26 February 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

OLUWAFEMI LONGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Anifowoshe, Counsel instructed by Linga & Co Solicitors
For the Respondent: Ms S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria, born on 6 November 1988 against the decision of the First-tier Tribunal who sitting at the Royal Courts of Justice on 27 August 2014 and in a determination subsequently promulgated on 12 September 2014 dismissed the appeal of the Appellant against the decision of the Respondent dated 29 April 2014 refusing his claim for asylum and under the Human Rights Act and against the making of a deportation order.

2. The basis upon which the appeal came before me was most helpfully summarised by First-tier Tribunal Judge R A Cox in his reasons for granting to the Appellant permission to appeal dated 3 October 2014, when having carefully considered the original Judge's determination in relation to the Appellant's grounds had this to say:

> "The grounds in essence contend that the Judge acted unfairly in refusing (the Appellant) an adjournment to produce further documentary evidence which might go to his risk on return to Nigeria. One of the matters he mentioned is his medical condition – he has TB for which, according to the evidence recorded by the Judge he still receives ongoing treatment.
>
> The Judge does not refer in his determination to any application to adjourn. I do not find his manuscript Record of Proceedings easy to read but I can devine that there was some preliminary discussion and that the case was put back for a short period. I note from the file that an application to adjourn had been submitted in writing by the Appellant's solicitors in advance of the hearing but rejected on the basis that there had been ample time to prepare his case. This certainly lends colour to the contention that an application was made to adjourn on the day. The Appellant was legally represented, as he had also been at the preceding case management hearing on 29/7/2014 when a listing for a substantive hearing was discussed.
>
> It is on consideration of the legible record of that CMRH and the ancillary documents, that I am persuaded that it is arguable that the decision to refuse an adjournment may have been unfair. The review was conducted by Judge Black who noted the several issues arising in the appeal amongst which was 'Health x 2 – TB + back pain'. He later notes that the Appellant's representative was to obtain a medical report and that would take four weeks. He notes other evidence to be obtained and served. Critically, on the yellow listing request form he wrote 'Relist after 29/9/2014'. No doubt that direction took account of the anticipated timescale for the obtaining, filing and service of the evidence that had been discussed, including the medical report. Indeed on a separate pink CMRH Directions form he made a specific Direction for such a report to be obtained and served. Clearly, his listing instructions were either overlooked or ignored because the appeal was actually listed for a substantive hearing on 27/8/2014 more than a month earlier than the Judge had directed and less than a month from the CMRH. It is therefore hardly surprising that the Appellant's representatives sought an adjournment on 11/8/2014 on receipt of the Notice of Hearing so that they could comply with Judge Black's Directions and perhaps regrettable that they were not sent a response until 21/8/2014 refusing their application. It does not assist me that Judge Miller made no reference to an adjournment application and his reasons for refusing it in his determination. If he had done so, it might have been that one could conclude that his reasons were sound and did not arguably render the proceedings unfair. However, on the face of what is before me, I must find the issue arguable.
>
> The grounds disclose an arguable material error of law in the determination and permission is granted".

3. Thus the appeal came before me on 23 February 2015, when my first task was to decide whether the determination of the First-tier Tribunal disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

4. At the outset of the hearing, Ms Anifowoshe was able to draw my attention to a certified typed copy of the First-tier Judge's Record of Proceedings from which it is apparent at sections C and D that the Judge recorded inter alia as follows. "It was said at the CMH there would be no hearing for two months". There is also reference to the following: "No mention in letter from Appellant's solicitors seeking adjournment on 11/8/2014 that no Respondent's bundle – just that they needed additional time for their enquiries?".

5. I was able to draw to the parties' attention the recent decision of the Court of Appeal in GS (India) & Ors v SSHD [2015] EWCA Civ 40 in which *inter alia*, following a consistent line of domestic and Strasbourg authority, it was held (indeed upholding the Upper Tribunal) that foreign nationals may be removed from the UK even where by reason of a lack of adequate healthcare in the destination State, their lives would be drastically shortened. Such action would not, save in the most exceptional case infringe Articles 3 or 8 of the ECHR. However, Laws LJ at paragraph 86 went on to say,:

> "If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm - the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm".

6. Notably the court espoused fully what had been said in its earlier decision in MM (Zimbabwe) [2012] EWCA Civ 279 at paragraph 23:

> "The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8 is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the Appellant had established firm family ties in this country, then the availability of continuing treatment here, coupled with his dependence on the family here for support, together establish private life under Article 8...
>
> Such a finding would not offend the principle expressed above, that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the Appellant is to be deported".

7. Under the subheading "The Article 8 Claims" at paragraph 85 Laws LJ continued as follows:

> "85. It is common ground that in cases where the claimant resists removal to another State on health grounds, failure under Article 3 does not necessarily entail failure under Article 8. In her skeleton argument at

paragraph 55 Ms Giovanetti for the Secretary of State cites JA (Ivory Coast) & ES (Tanzania) v SSHD [2009] EWCA Civ 1353, in which the Appellants had been given a 'de facto commitment' that they would be allowed to remain in the UK for treatment. Sedley LJ with whom Longmore and Aikens LJJ agreed said this at paragraph 17:

> 'There is no fixed relationship between Art. 3 and Art. 8. Typically a finding of a violation of the former may make a decision on the latter unnecessary; but the latter is not simply a more easily accessed version of the former. Each has to be approached and applied on its own terms, and Ms Giovannetti is accordingly right not to suggest that a claim of the present kind must come within Art. 3 or fail. In this respect as in others, these claims are in Mr Knafler's submission distinct from cases such as D and N in both of which the Appellant's presence and treatment in the UK were owed entirely to their unlawful entry...'"

8. Thus it followed that Article 8 might be taken in circumstances where the combination of family life and problematic health could lead to an Article 8 "health case".

9. There was in such circumstances common ground between myself and the parties that it could not be said that had an adjournment been granted, that the decision of the First-tier Tribunal would be bound to have been the same, at the resumed hearing, notwithstanding what the medical evidence about the Appellant's TB might in the event, state.

10. The parties agreed with me, that coupled with the problematic procedural history identified by FTJ Cox (above) it followed that there was procedural unfairness and that in all the circumstances the Appellant had been denied a fair hearing and that the case should thus, be remitted to the First-tier Tribunal for a fresh hearing with none of First-tier Judge Miller's findings preserved.

11. I would add the observation, that in such circumstances, it does not matter whether or not the Judge at the hearing entertained a renewed adjournment request, although it does appear that the Judge may not have taken into account, Judge Black's earlier listing instructions, that the case was not to be listed until after 29 September 2014 to enable the Appellant to obtain the medical evidence he sought. In the event, the appeal was listed for a substantive hearing before the Judge on 27 August 2014.

12. I was told by Ms Anifowoshe that there would be oral evidence given by the Appellant and three other witnesses comprising his mother, sister and brother. No interpreter would be required.

13. It was thus apparent to me that there were highly compelling reasons falling within paragraph 7.2(b) of the Senior President's Practice Statement, as to why the decision should not be remade by the Upper Tribunal. It was clearly in the interest of justice that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

14. For the reasons that I have given above and by agreement with the parties, I concluded therefore that the appeal should be remitted to a First-tier Judge other than Judge K S Miller, to determine the appeal afresh at Taylor House Hearing Centre on the first available date with a time estimate (given the number of witnesses) of three hours.

Decision

15. The First-tier Tribunal erred in law such that its decision should be set aside and none of their findings preserved. I remit the making of the appeal to the First-tier Tribunal at Taylor House before a First-tier Tribunal Judge other than Judge Miller.

No anonymity direction is made.

Signed Date: 25 February 2015

Upper Tribunal Judge Goldstein