



IAC-FH-AR-V1

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

Appeal Number: HU/00041/2015

THE IMMIGRATION ACTS

Heard at Field House

On 14 April 2016

**Decision & Reasons
Promulgated
On 13 May 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**JAAL
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Adebayo, of Lonsdale & Mayall Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Mitchell who, in a decision promulgated on 19 August 2015, dismissed the Appellant's appeal against the Respondent's decision of 29 January 2015, served on him on 02 February 2015, refusing his human right

claim. The Respondent's decision additionally certified the Appellant's human rights claim under section 94B of the Nationality, Immigration and Asylum Act 2002, the consequence of which is that the Appellant could only appeal the decision refusing his human rights claim after he left the United Kingdom.

2. The Appellant was deported to Nigeria on 24 March 2015. The Judge dismissed the appeal without hearing any evidence from the Appellant's partner, who was not present at the hearing. The Appellant contends that his partner was trying to get the hearing centre and that the First-tier Tribunal committed a procedural impropriety rendering the hearing unfair by proceeding in the partner's absence.

Background

3. The Appellant is a male national of Nigeria, date of birth 05 June 1980. He claims to have entered the United Kingdom in 1988 aged 8. Although noting the absence of evidence to support this assertion the Respondent does accept that Appellant's grandparents became his legal guardian in 1991. She acknowledges that he spent a 'significant period of time in the UK'. The Appellant was granted Indefinite Leave to Remain (ILR) on 15 January 2003. He travelled once to Nigeria for a ten day trip on 18 June 2005.
4. The Appellant has three children born in the United Kingdom, all of whom are said to be British citizens. The oldest child was born in November 2004 to his ex-partner. His other two children were born in May 2009 and July 2010 to his current partner. The Appellant maintains that he has a genuine and subsisting relationship with all three children, and with his current partner. The Respondent accepted that these relationships were genuine and subsisting.
5. The Appellant maintains that his two youngest children have severe language difficulties and are autistic. His middle child is also said to suffer from attention deficit hyperactivity disorder (ADHD) and was receiving one-on-one anger management treatment. The First-tier Tribunal Judge noted the absence of any independent evidence to support the last assertion, but, for the purposes of the appeal before him, accepted that it was so. A letter before the First-tier Tribunal from Norfolk County Council, dated 03 February 2015, confirmed that both of the Appellant's children with his current partner were subject to a Child Protection Plan under the category of Emotional Abuse. This was as a result of their mother's mental health difficulties and history of substance misuse, and an incident of domestic violence between their mother and an ex partner of hers. The letter indicated that both the children had "... considerable difficulties with their speech and language, and are receiving ongoing support for this". Both children were said to be behind in their learning and were affected by their mother's mental health and substance misuse. A GP letter dated 11

February 2015 described the Appellant's partner as having a long history of anxiety and depression and was, at that time, under the care of the Mental Health Team. She had a history of psychoactive substance misuse with '*current opioid dependence and maintenance on Subutex*'. She was said to have anxious, paranoid and emotional unstable traits with a possible post-traumatic stress disorder.

6. Between 22 May 2001 and 21 November 2008 the Appellant committed 29 offences for which he received 10 convictions. On 03 November 2010 the Appellant was convicted of causing Grievous Bodily Harm with intent, and supplying a Class A drug. The GBH offence involved the use of torture to inflict pain through, *inter alia*, the use of a hot iron and boiling water. On 06 June 2011 the Appellant was sentenced to 10 years imprisonment for the first offence and 5 years imprisonment for the 2nd offences, both sentences to run concurrently. It is clear that these were offences of the utmost seriousness.
7. A letter from the Probation Service, dated 26 February 2015, indicated that the Appellant had recently been in a category D prison and had been issued with a temporary licence to the Norwich area to 'rebuild family ties'. The Appellant was said to have used his time in prison in a productive way and had completed several educational and other courses. He had provided all negative mandatory drug tests. He was assessed as posing a high risk of serious harm to the public and known adult, but this would be reviewed after his release after he had spent time in the community.
8. In her refusal of the Appellant's human rights claim the Respondent set out the Appellant's immigration and criminal history. Having noted, as a result of the length of his index offence, that the Appellant could not meet the requirements of paragraphs 399 or 399A of the immigration rules, the Respondent considered whether there were 'very compelling circumstances' over and above those contained in paragraphs 399 and 399A that could outweigh the public interest in the Appellant's deportation. She concluded there were not.
9. In preparation for First-tier Tribunal appeal hearing on 10 August 2015 the Appellant's representatives created a bundle running to 264 pages. This included unsigned and undated statements from the Appellant, his brother and his partner, a handwritten statement from the Appellant dated 10 March 2015, a further statement from the Appellant's partner dated 05 February 2015, a school report relating to the Appellant's oldest child, personal correspondence between the Appellant and his family and photos of the Appellant with his family.

The hearing before the First-tier Tribunal and its decision

10. The first 8 paragraphs of the First-tier Tribunal's decision appear under the heading 'Details of the Appellant and Some Preliminary Matters'.

The Judge noted that a case-management hearing had been held on 03 June 2015 and that there were to be six witnesses on the Appellant's behalf. Confirmatory notices setting out the date, time and place of the hearing were sent to the Appellant's representatives on 12 June 2015. These indicated that the start time of the hearing was 10am.

11. On the day of the hearing both parties' representatives were said to be present at 10am, Mr Adeolu being the Appellant's representative. According to his decision the Judge was informed that the witnesses had not arrived at 10am. At 10:45 the Judge was informed by Mr Adeolu that he had been in contact with the witnesses at 10:30, who were, at that time, at Liverpool Street Station, and that they were on their way to the hearing centre, the witnesses having missed an earlier train. The Judge, aware that it would take around half-an-hour to reach the hearing centre from Liverpool Street station, returned to his chambers after dealing with other preliminary matters. He was informed at 11:10am that the witnesses had not arrived. The Judge returned to the hearing room at 11:35am. The witnesses were not present. Mr Adeolu informed the Judge of an unsuccessful attempt he made to contact the witnesses at 11:21am.
12. At this stage there was an application by the Home Office Presenting Officer for the appeal to proceed by way of submissions only. The Judge indicated that, in the absence of any application to adjourn, the First-tier Tribunal was required to proceed to hear the case unless there was a good reason for the absence of the witnesses. According to the Judge Mr Adeolu indicated that he had nothing to say in response to the application. The Judge thereafter stated that he would proceed to hear the appeal in light of the absence of an explanation for non-attendance by witnesses and any application for an adjournment.
13. Having heard submissions from the Respondent Mr Adeolu indicated that it was regrettable that the witnesses were not present and stated that the appeal was not suitable for a 'submissions only' approach. Mr Adeolu then made an adjournment application which was refused. In so doing the Judge noted that at 10:30am the witnesses were only a half hour's walk from the Tribunal, and that it was now 11:55am. The Judge noted that the witnesses had Mr Adeolu's mobile phone number but that there had been no attempt to contact him. Having regard to the statements in the Appellant's bundle the Judge was of the view that the hearing could fairly proceed by way of oral submissions. The adjournment application having been refused, Mr Adeolu stated that it would not be in his client's best interests for him to make oral submissions. The appeal decision was reserved at 12 noon. Crucially for the purposes of this error of law hearing, the Judge stated, at paragraph 8, that he instructed the Tribunal administration to let him know if any witnesses subsequently arrived. Having heard other cases from the float list the Judge confirmed at 1:30pm that the witnesses had still not arrived at the Tribunal.

14. Having set out the above history of the hearing, the Judge proceeded to determine the appeal. The Judge made reference to the appropriate immigration rules and his duty to take account of his considerations in sections 117B to D of the Nationality, Immigration and Asylum Act 2002 (paragraphs 67 to 73). The Judge considered the appropriate judicial authorities (paragraphs 65, 66, 74 & 98) and he took account of the medical evidence before him relating to the Appellant's partner and children (paragraph 94). The Judge sought to identify the best interests of the children (paragraphs 101 & 108) and had regard to the public interest considerations (paragraphs 105 & 113). The Judge accepted that the Appellant had a genuine and subsisting relationship with his children (paragraphs 80 & 81), but found that he had not been involved in the children's lives during the time he was incarcerated and that the children had largely grown up without him (paragraphs 80 & 106). The Judge concluded that the refusal of the human rights decision had the 'potential' to be an interference with the family life that 'may exist' between the Appellant and his children (terminology that may, on its face, be inconsistent with his findings at paragraphs 80 and 81). The Judge expressed doubts about the Appellant's relationship with his partner given that she fathered a child with another man in 2013 and, significantly, given her absence from the appeal hearing (paragraph 95). Having regard to the seriousness of his offending and the stated high risk of serious harm to the public the Judge found there were no very compelling circumstances concerning the Appellant's relationship with his partner and children sufficient to outweigh the public interest and he dismissed the appeal.

The Grounds of Appeal to the Upper Tribunal

15. The poorly drafted grounds of appeal made reference to a statement from Mr Adeolu signed and dated 17 September 2015, almost a month after the decision was promulgated (an application for an extension of time was granted by the First-tier Tribunal). Mr Adeolu claimed that the 'lead witness' (the partner) had missed her train as a result of child-care issues. She was travelling from Norfolk and was not familiar with London. Mr Adeolu and the Home Office Presenting Officer had informed the Judge that only the partner would be cross-examined and, as a result, her evidence was considered to be 'crucial'. Mr Adeolu stated that the Judge entered the hearing room at 10:45am and said he was 'bored sitting upstairs'. Mr Adeolu stated that the Judge then returned to his chambers and returned to the hearing room at 11:30am indicating that he was going to commence the appeal without hearing oral evidence. Mr Adeolu maintains that he did suggest to the Judge that the witness may be in an underground train, a point not recorded either by the Judge in his Record of Proceedings (ROP) or in the Home Office Presenting Officer's note of the hearing. Mr Adeolu denied that he failed to object to the hearing proceeding without the witnesses. Mr Adeolu complained that the Judge should have heard from him first rather than the Presenting Officer. This, it was claimed, constituted a

procedural impropriety. Mr Adeolu stated that, by the time the hearing commenced, the witnesses were 'only 95 minutes late', and that there were still 85 minutes until the lunch break.

16. Paragraphs 18 and 19 of Mr Adeolu's statement are of particular relevance in this error of law hearing. He stated that the witnesses arrived at the hearing centre around 12:05pm. He stated that the witnesses signed in at the reception desk and "... *the witnesses requested the receptionist to indicate the time they arrived [sic] the court premises.*" Mr Adeolu then queried the Judge's assertion relating to his instruction to the court administration to let him know if any witnesses arrived after the hearing had ended. Mr Adeolu thereafter criticised the Judge's decision to proceed with the hearing in the absence of the witnesses and claimed that the Judge acted unreasonably. The grounds argued that the hearing was unfair, that the judge's failure to wait for the attendance of the Appellant's partner amounted to a material error of law and was unreasonable, and that the same amounted to a breach of Article 6 ECHR.

The proceedings up to the error of law hearing

17. Following the grant of permission to appeal by the First-tier Tribunal an error of law hearing was set down for 19 February 2016 in front of Deputy Judge Latter. At this hearing, somewhat surprisingly given that he had filed a statement giving evidence relating to the proceedings before the First-tier Tribunal, the Appellant was represented by Mr Adeolu. The appeal was adjourned to give the First-tier Tribunal Judge an opportunity of commenting on the grounds of appeal and the supporting witness statement. The Deputy Judge noted that this would also give the Appellant, through his representative, an opportunity to obtain from Taylor House the witness sheet for 10 August 2015 referred to in paragraph 20 of Mr Adeolu's witness statement. I note that a written request was made to Taylor House on 09 March 2016 for the sign-in sheet for the 10 August 2015 hearing. I was informed at the error of law hearing that the Taylor House administration had failed to respond to the request. The adjournment was also granted to give Mr Adeolu an opportunity to make arrangements for another advocate to appear at the adjourned hearing if his statement was to be put in evidence. Permission was granted for the Appellant to file further witness statements concerning the conduct of the First-tier Tribunal hearing.
18. In an email dated 03 March 2016 the First-tier Tribunal Judge provided a response. With reference to his decision and his Record of Proceedings (ROP) the Judge noted that, at 10:30am, the witnesses were said to be in Liverpool Street Station, which was less than 30 minutes from the hearing centre. They had failed to arrive by 11:35am and were not answering Mr Adeolu's calls. The Judge noted that Mr Adeolu did not resist the Home Office Presenting Officer's application to

proceed with the hearing, noting only that the witnesses were not present and that the Appellant was in Nigeria. There was no adjournment application at this stage. One was only made after the Respondent's submissions. When this was refused Mr Adeolu did not make any submissions, indicating that he would rely on representations contained in earlier correspondence he himself had drafted. The Judge commented that no explanation was offered for the absence of the witnesses. The Judge stated that he had asked the Tribunal administration to inform him if the witnesses did arrive but, by 1:30pm, they had not done so.

The error of law hearing

19. Prior to the commencement of the hearing on 14 April 2016 the Judge's typed ROP and handwritten record of the preliminary issues were provided to the parties. On 08 April 2016 the Upper Tribunal received a statement from ML, the Appellant's sister, and a further copy of the statement from Mr Adeolu. At the hearing, after having obtained the necessary clearance, Ms Willocks-Briscoe served on the Appellant and the Tribunal a copy of the Presenting Officer's handwritten notes from the First-tier Tribunal hearing.
20. Given the conflicting evidence surrounding the circumstances of the First-tier Tribunal hearing and the nature of the error of law in play, I heard oral evidence from Mr Adeolu and from the Appellant's sister.
21. Mr Adeolu adopted his statement. I asked a number of preliminary questions. I asked him whether he had a contemporaneous record of the events of the First-tier Tribunal hearing. He said he did keep a record but it had not been disclosed. When I asked Mr Adeolu whether he was OISC certified he did not understand the question. He claimed he worked under the supervision of a person who was authorised to practice by a designated professional body. This was consistent with his 'section 84 form' provided at the hearing on 10 August 2015. I inquired whether a statement had been obtained from the Appellant's partner. Mr Adeolu said that no statement had been obtained and that no attempt had been made to obtain a statement. He claimed the partner went into 'rehab' soon after the First-tier Tribunal hearing. There was no independent evidence before me that the partner had entered rehab. Mr Adeolu confirmed that his firm had not received any response from Taylor House following a request for the sign-in sheet.
22. In examination-in-chief Mr Adeolu claimed that he made a full statement and did not see it as essential that he attach his contemporaneous notes from the hearing. He confirmed that the partner entered rehab one or two days after the First-tier Tribunal hearing and that she remained in rehab. She was in a terrible state of health and her children had been taken away from her. There was no evidence to support this assertion because permission had to be

obtained from the Family Courts. No attempt had been made to obtain permission from the Family Courts. For the same reasons there was no medical evidence relating to the partner.

23. Mr Adeolu was asked to describe what happened after the conclusion of the appeal hearing. He described how and when the witnesses arrived and that he advised them to sign in at the reception desk. He had spoken to a Taylor House receptionist and asked for the Judge to return. He claimed that the Presenting Officer walked by at this stage as she was hurrying to attend to a family issue.
24. In cross-examination Mr Adeolu said no statement was taken from the Appellant's partner at the hearing centre because she was agitated and 'broke down'. He believed at that time that a statement could be taken at a later stage. Mr Adeolu stated that he made an adjournment request on two occasions. The first time was shortly before the commencement of the hearing at 11:35am when he asked for the case to be put back, and the second time was when the Judge invited him to make submissions. When it was suggested to Mr Adeolu that he refused to make submissions he stated that he did not refuse to make submissions but he indicated that "... *it was not a case suitable for submissions.*" He confirmed that he did not make any submissions. Mr Adeolu explained that, following his call to the Appellant's partner at 10:30am, he called again afterwards but the lines were not connecting. He told the Judge this may be because the witnesses were on the Underground. He had earlier informed the Judge that the Appellant's partner was late as a result of child-care issues.
25. In response to a question from me Mr Adeolu stated that, if the Appellant's partner had given evidence at the hearing, she would have described the impact that the Appellant's deportation had on her and her children's lives. There had been some developments following her statement such as the issue of rehab. The partner had apparently arrived at the hearing centre with a letter relating to her proposed rehab, but there was no copy of this letter. Mr Adeolu confirmed once again that he asked for the Taylor House reception to inform the Judge of the arrival of the witnesses. He was informed by the receptionist that this information would be passed onto the Tribunal usher. Mr Adeolu did not see the usher himself and he and the witnesses remained in Taylor House for 30 to 40 minutes before leaving.
26. The Appellant's sister, ML, signed and adopted her statement. In her statement she indicated that she was one of the witnesses who was to give evidence at the appeal hearing on 10 August 2015. She was called very early in the morning by the partner as there had been a 'disappointment' regarding her child care arrangements. As a result the partner missed her train. She was upset and confused. It was claimed the partner was a 'bipolar patient' and had 'drug problems'. The partner was not familiar with London. ML, who lived in Forest Gate, said

she would meet the partner at the train station and would take her to the Tribunal. At all times ML claimed she was communicating developments to the Appellant's legal representatives. When ML and the Appellant's partner eventually arrived around 12 noon Mr Adeolu, who was walking into the reception area, announced that the Judge had not waited. The Appellant's partner was described as being 'quite agitated' and demanded to go and meet the Judge in his room to explain her late attendance. She was informed by the receptionist that this would not be possible. Mr Adeolu advised that the witnesses sign-in and insisted that the reception record the time of arrival. The Appellant's children have now been subjected to care proceedings. The Appellant's partner was said to be in rehab and ML had put herself up as 'special guardian'.

27. In examination-in-chief ML expanded upon her written statement. When ML met the Appellant's partner at Liverpool St station she contacted the legal representative at Taylor House and intended to head to the court. The partner was however in quite a state. The partner was said to have been inappropriately dressed and ML thought it was best to 'clean her up' as she was crying. They therefore took a detour to Stratford Station. ML was trying to get in contact with the representative but the line kept on going to voicemail. She believes she left a voicemail message, but could recall for certain. After obtaining a change of clothes ML attempted to call the representative from Mile End station when the train they were travelling on stopped. When asked why she had not let the representative know where they were ML said that the partner was 'all over the place' and ML had to calm her down. ML was juggling trying to calm the partner down with trying to get her to the hearing centre. They eventually came to Chancery Road tube station. ML had never been to the hearing centre before and waited for a bus. The first bus they got on was going the wrong way. They saw no taxis. She tried to contact the representative but was unable to speak to him. They eventually arrived at Taylor House around 12 noon. When they got to the reception area they saw the representative who said the proceedings had finished. The partner was frantic and said she wanted to speak to the Judge. They had to calm her down. They were there for some time and did not leave until around 1pm. The representative insisted that they sign-in. When asked whether the representative spoke to the staff at Taylor House, ML said he may have done. He spoke to one or two people but could not recall much detail. The Appellant's partner was not present at the error of law hearing because she had a lot of problems due to drug abuse. It was difficult to get hold of her and she was erratic and 'over the place'.
28. In cross-examination ML confirmed that she saw the representative when she was at the counter of the hearing centre and he told her to sign a sheet of paper. She was pretty sure there were members of staff there. When asked whether she had seen the legal representative speak to staff at the counter ML said 'yes'. When asked why the detour

to Stratford did not appear in her statement ML said she was uncomfortable putting this into a statement as she had not discussed it with the partner. ML did not give the representative a detailed explanation for their late arrival because 'everything was in a fluster'. ML stated that the Appellant's partner made every effort to be present at the hearing in August 2015.

29. In his submissions Mr Adebayo invited me to find the witnesses were credible. The First-tier Tribunal judge, it was submitted, had a wide discretion and should have adjourned the hearing. An extract from the Home Office Presenting Officer's written note read, "*Judge says he doesn't care if rep makes submissions or not.*" This, it was submitted, indicated that the appeal did not matter to the Judge. Ms Willocks-Briscoe submitted that it was for the Appellant to prove his case and that any procedural impropriety would not have made a material difference to the decision given the seriousness of his offences.

Discussion

30. I have considered the statements and the oral evidence from both Mr Adeolu and ML in detail, set against the Judge's ROP and comments. There were several aspects of Mr Adeolu's evidence that I found unsatisfactory. The Judge's contemporaneous note indicates that it was the Presenting Officer's suggestion that the appeal proceed by way of submissions. This stands in contrast to Mr Adeolu's statement, which was written almost a month after the decision was promulgated. In the absence of any contemporaneous note from Mr Adeolu I find the evidence from the Judge to be more reliable. Mr Adeolu denied the assertion, contained in paragraph 6 of the decision, that he had nothing to say in response to the application to proceed with the hearing. Mr Adeolu's statement accompanying the grounds of appeal asserts that he 'strongly objected to the matter as not suitable for submission only' and that the fair thing to do would be to wait for the witness. His statement does not however indicate that he made an adjournment application at this stage, and, at paragraph 14 of his statement, he indicated that he did not ask for an adjournment prior to submissions. The Judge's contemporary note states that no adjournment application was made prior to the commencement of the Respondent's submissions. This is echoed to some extent in the Presenting Officer's contemporaneous notes which state, "*Judge states adjournment not even been requested.*" However, in his oral evidence Mr Adeolu claimed that he did make an application to adjourn in order to put the matter back shortly before the commencement of submissions. Having regard to this evidence I am satisfied that this aspect of Mr Adeolu's evidence is not reliable and that he did not make an adjournment application prior to the commencement of the Respondent's submissions.
31. There is no merit whatsoever in Mr Adeolu's assertion that a procedural impropriety occurred because the Judge first heard submissions from

the Respondent. In circumstances where an appeal proceeds by way of submissions only it is convention for the Respondent to make her submissions first and the Appellant to then respond to those submissions. Nothing in the order in which the Judge heard submissions even arguably amounts to a procedural irregularity.

32. Mr Adeolu's statement contained no reference to his assertion, made during his oral evidence, that he spoke to a Taylor House receptionist and asked for the Judge to return. Given the importance he attached to the oral evidence that he sought to extract from the partner I find this a surprising omission. In his oral evidence Mr Adeolu accepted that he did not attempt to communicate with the clerk to the hearing room. Having been refused an adjournment application, and in the absence of his witnesses, I find it surprising that Mr Adeolu did not seek to make formal submissions on behalf of his client, a decision that arguably did not serve his client's best interests.
33. I found ML, however, to be a most impressive witness. Her evidence was given in a direct and forthright manner, and without hesitation. She engaged with each question and her answers were given in detail. Her evidence was internally consistent and largely consistent with her statement. There was no perceptible attempt at embellishment. Whilst the provision of detailed and consistent evidence is not determinative of credibility, it is indicative of credibility. ML's explanation for seeking to calm the partner down and obtain a change of clothes is inherently plausible. Given the background and circumstances of the Appellant's partner, which was supported by reference to the medical documents produced, I accept that she arrived late at Liverpool Street Station and in a state of some distress. While it may not have been advisable to keep a Tribunal waiting, one can appreciate why ML suggested they first go to Stratford. Mr Adeolu's inability to contact the partner or ML at 11:21am is consistent with ML's evidence that they were on a tube train heading to Chancery Lane station. I again accept as inherently plausible ML's claim that she had never previously visited Taylor House and that, having emerged from Chancery Lane station, she believed it best to wait for a bus. I also accept as inherently plausible, if unfortunate, that she got on the wrong bus.
34. Significantly, ML's evidence relating to the events that occurred after she and the Appellant's partner arrived at Taylor House was largely consistent with that of Mr Adeolu. This is with particular regard to the time at which she arrived at Taylor House, the partner's emotional state, the instructions from Mr Adeolu to sign in at the reception counter, and, crucially, her witnessing Mr Adeolu speaking to the staff. Having weighed up my concerns with aspects of Mr Adeolu's evidence, and having given careful consideration to ML's account, I am satisfied that Mr Adeolu did ask for the Taylor House reception staff to inform the Judge of the arrival of the witnesses.

35. Both Mr Adeolu and ML were adamant that the ML and the Appellant's partner signed in. In his response to the grounds of appeal the Judge indicated that he asked the court administration to inform him if the witnesses did arrive and that they had not done so by 1:30pm. I have no reason to doubt the accuracy of the Judge's comments. Having given careful and holistic consideration to the totality of the evidence before me I find that the administrative staff at Taylor House were informed of the arrival of the witnesses at around 12 noon, that they were asked to pass on this information to the Judge, but that they failed to do so.
36. In light of the above findings I find that the Judge did not act in a procedurally unfair or inappropriate manner. He waited some 1 hour and 35 minutes before proceeding with the appeal in circumstances where there had, incredibly, been no application to adjourn. The Judge was entitled to assume that the witnesses would only take around half an hour to reach Taylor House having been informed that they were at Liverpool St at 10:30am. The Judge waited over an hour before proceeding with the hearing. There was no explanation offered for the non-attendance of the witnesses other than possible speculation that they may be on the Underground.
37. I nevertheless find that there has been a procedural impropriety capable of undermining the fairness of the proceedings. I have found that the administrative staff at Taylor House failed to inform the Judge of the arrival of the witnesses shortly after the close of the hearing. Mr Adeolu requested that the Judge be informed. The Judge himself asked the staff to inform him. This was not done. Under the case management powers of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 the First-tier Tribunal has a relatively wide discretion as to how it regulates its own procedure. It would have been open to the First-tier Tribunal Judge, had he been informed of the attendance of the witnesses, to have either re-opened the hearing or to have re-listed the hearing for another date, assuming of course that he found it appropriate to do so in light of any explanation offered for the delayed attendance and with the overriding objective of the Rules in mind. The failure to communicate this information to the Judge, which deprived him of the opportunity to consider these options, constituted a procedural impropriety and a breach of procedural justice (see *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) and *Marghia (procedural fairness)* [2014] UKUT 00366 (IAC)).
38. Ms Willocks-Briscoe submitted that any unfairness could not have affected the lawfulness of the underlying decision as it could not have been material. The Appellant committed extremely serious offences and received a substantial custodial sentence. He could only succeed by persuading the First-tier Tribunal of the existence of very compelling circumstances over and above those contained in paragraphs 399 and 399A of the immigration rules. The First-tier Tribunal judge had before

him statements from the partner and some evidence of her and her children's circumstances, and this was sufficient to enable him to deal fairly with the appeal.

39. Whilst there is some force in these submissions, I am ultimately persuaded that, had the First-tier Tribunal Judge heard and assessed the partner's oral evidence, he would not inevitably have reached the same conclusion. Given that the Appellant has already been deported it is vital that the highest standards of fairness are applied. The partner was to provide the core evidence relating to the impact of his deportation on her and her children. The partner did speak in her statement of her relationship with the Appellant and his relationship with their children. A statement cannot however always cover all material aspects of an appeal, and points may arise in a hearing that were not anticipated or which require clarification. Events had, it appears, progressed since the partner's most recent statement. She was, at the date of the hearing, expected to shortly enter 'rehab' and, it is claimed, had brought with her a letter to this effect. The impact of such a move on the children, requiring them to live with another family member other than their parents, was a relevant factor that the Tribunal could have considered, especially given their medical and learning difficulties and their being subject to a Child Protection Plan. The Judge concluded that there was no subsisting relationship between the Appellant and his partner, a point that could have been investigated in a hearing, and the existence of a relationship and impact on the partner of the deportation were clearly relevant factors in an overall assessment under paragraph 398 of the immigration rules.
40. I am satisfied, for the reasons given, that the determination is unsafe and that it must be re-made. It is appropriate to remit the appeal back to the First-tier Tribunal for a fresh hearing, all issues open, to give the Appellant's partner an opportunity of attending the hearing and giving oral evidence, and for any further evidence to be provided relating to the existence of very compelling circumstances'.

Notice of Decision

The First-tier Tribunal's decision is marred by a material error of law.

The appeal is remitted back to the First-tier Tribunal pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 for reconsideration, to be decided afresh.

The appeal is to be listed before a Judge other than Judge of the First-tier Tribunal Mitchell.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

11 May 2016
Date

Upper Tribunal Judge Blum