



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

Appeal Number: PA/06492/2017

**THE IMMIGRATION ACT**

**Heard at Manchester**

**On 22<sup>nd</sup> February 2018**

**Decision & Reasons Promulgated**

**On 01<sup>st</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between**

**RL**

**(Anonymity Direction made)**

**Appellant**

**and**

**The Secretary of State for the Home Department**

**Respondent**

**Representation:**

For the Appellant: Mr Uddin of Counsel instructed by Irvine, Thanvi Nata Sols.

For the Respondent: Mr Bates Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of the Democratic Republic of the Congo. There are references in the papers to the children of the appellant. Taking that into account I consider it appropriate to make an anonymity direction.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Herwald. By the decision promulgated on 21<sup>st</sup> August 2017 Judge Herwald dismissed the appellant's appeal against the decision of the respondent to refuse him asylum, humanitarian protection or relief otherwise on human rights grounds either under Articles 2 and 3 or under Article 8 of the ECHR.
3. The date of the decision by the respondent was 23 June 2017 and is headed Decision to Refuse a Protection and Human Rights Claim.
4. By decision dated 15 September 2017 First-tier Tribunal Judge M J Gillespie granted permission to appeal to the Upper Tribunal. Thus the matter appeared before me to determine in the first instance whether or not there is a material error of law in the decision.
5. The grounds of the appeal raised two principal matters:-
  - i) The fact that the judge refused the appellant an adjournment.
  - ii) The fact that the judge, having refused the adjournment, has failed to take account of relevant matters, whereby the appellant was prevented from properly presenting his case, and taken account of irrelevant matters in assessing the rights of the appellant.

#### Background chronology

6. The appellant was born in September 1983 in the DRC. He came to the United Kingdom with his parents arriving on 3 August 1989 when he was aged 5 years old. At that stage his parents claimed asylum but that claim was refused on 27 September 1991.
7. The parents thereafter made application for leave to remain but this was refused in January 1992. Accordingly the family were in the United Kingdom without any valid leave.
8. On 20 August 1996 the appellant's mother claimed asylum in her own right with her children as dependants. That claim was refused in May 2000. However the family were at that stage granted discretionary leave to remain until 30 May 2004.
9. Whilst the mother's claim for asylum was pending, the appellant was involved in a number of criminal offences:
  - i) *30 September 1999 Haringey Youth Court-for using threatening abusive and insulting words or behaviour to cause of fear or provocation of violence-the appellant was ordered to attend an attendance centre.*

- ii) 7 October 1999-Haringey Juvenile Court- allowing himself to be carried on a conveyance taken without authority-12 month conditional discharge and £10 costs.
- iii) 17 February 2000 Haringey Magistrates Court-aggravated vehicle taking and using threatening and abusive words and behaviour-18 month supervision order and disqualified from driving for 12 months.
- iv) 30 March 2000 Haringey Magistrates Court-interfering with a motor vehicle, taking a conveyance without authority and breaching his conditional discharge-18 hours at an attendance centre.
- v) 13 July 2000 Haringey Magistrates Court-possessing a bladed article in public and failing to surrender to bail-12 month conditional discharge and 12 months it had an attendance centre.
- vi) 14 September 2000 Haringey Juvenile Court-theft, being carried on a motor vehicle taken without consent, failing to surrender to custody, driving whilst disqualified, destroying or damaging property, driving without insurance and failing to surrender to bail received 4 months detention and training order, fined £25 and disqualified for 12 months and his licence was endorsed.
- vii) 5 April 2001 Haringey Juvenile Court- taking a motor vehicle without consent, driving whilst disqualified and driving without insurance - 18 month Community Rehabilitation Order and his licence was endorsed.
- viii) 15 January 2002 Barnet Magistrates Court resisting or obstructing a constable find £100.
- ix) 25 February 2002 Harrow Crown Court- burglary and theft- 18 months in a young offenders' institution.
- x) 19 August 2003 Haringey Magistrates Court- possession of a class B controlled drug cannabis- find £30.
- xi) 21 July 2004 Horseferry Road Magistrates Court- destroying or damaging property, assaulting a constable and criminal damage- 100 hours community punishment order.

There are further offences recorded against the appellant as more particularly appear hereafter. Whilst in respect of many of the offences the appellant would have been a minor, certainly from January 2002 onwards he was over 18 years old.

- 10. On 9 November 2004, separately from the rest of his family, the appellant applied for indefinite leave to remain in the United Kingdom. This appears to have been granted on 11 August 2005.
- 11. The appellant at the time had acquired a number of further convictions before leave was granted and there were a number of convictions post the granting of leave: -
  - i) On 6 April 2005-Highbury Corner Magistrates Court failing to surrender to custody-7 days imprisonment.

- ii) *27 January 2006 Wood Green Crown Court burglary and theft-21 months imprisonment.*
  - iii) *9 March 2006 Middlesex Guildhall Crown Court handling stolen goods- 3 months imprisonment.*
  - iv) *18 August 2006-Middlesex Crown Court one count of false imprisonment and one count of blackmail- 5 years imprisonment.*
12. By the time of the offences the appellant was over 21 years old. On 31 October 2007 a notice of the decision to make a deportation order was served on the appellant whilst he was in detention.
  13. On 1 November 2007 the appellant lodged an appeal against the decision. His appeal was heard and dismissed on 17 July 2008. A copy of the decision it is enclosed in the papers. The appellant became appeal rights exhausted as of 25 July 2008. On 8 October 2008 the appellant was served with a signed deportation order. It appears that the appellant after completing his criminal sentence was detained under immigration powers. The appellant appears to have been detained on more than one occasion under immigration powers and to have been detained for significant periods of time.
  14. On 25 March 2010 the appellant submitted a Pre-Action Protocol letter challenging the decision to remove him and requesting that his indefinite leave to remain be reinstated. By the 1 April 2010 the respondent had rejected that request and maintained the decision to deport the appellant.
  15. On 27 May 2010 the appellant lodged a judicial review application against that decision. Permission to pursue the judicial review was refused and on 23 June 2010 at an oral hearing permission was again refused. 2<sup>nd</sup> July 2010 the appellant confirmed that he was not renewing his claim for judicial review.
  16. On 12 October 2010 the appellant lodged further submissions challenging the decision to deport him from the United Kingdom.
  17. On 21 September 2011 the appellant was convicted at Uxbridge Magistrates Court of common assault and was sentenced to 5 weeks imprisonment.
  18. On 7 March 2012 the appellant submitted further submissions challenging his removal. Whilst those were refused, it appears that they were treated as an application to revoke the deportation order and the appellant was given an in country right of appeal against the decision to refuse to revoke the deportation order. On 26 June 2012 the appellant's appeal against the refusal to revoke the deportation order was dismissed. By 6 July 2012 the appellant was again appeal rights exhausted. In the respondent's bundle of documents for the present hearing are the documents submitted in support of the appeal against the refusal to revoke the deportation decision, which includes statements from 2 of the sisters of the appellant, one of whom wished to give evidence.

19. Whilst initially the appellant was represented by Fadiga & Co that representation seems to have changed and he was later represented by Broudie, Jackson, Canter.
20. There is in the respondent's bundle a large amount of documentation from the previous appeals. It is clear at that stage that the appellant was seeking in part to rely upon both protection issues and human rights issues in seeking to originally defend the making of the deportation order proceedings and subsequently applying to revoke the deportation order.
21. On 31 August 2012 an application was made for emergency travel documents to enable the appellant's removal to the DRC. Pending obtaining the emergency travel documents the appellant was released from immigration detention.
22. On 1 February 2013 the appellant lodged further submissions again challenging the decision to remove him.
23. On 2 December 2013 the appellant was re-detained to enable an interview to take place again with a view to obtaining emergency travel documents. The interview was set for 12 December 2013.
24. On 4 December 2013 the appellant's further submissions, from 1 February 2013, were refused. The appellant was served with the refusal at his detained location.
25. On 11 December 2013, 16 December 2013 and 13 January 2014 the appellant lodged further submissions challenging his removal.
26. On 27 January 2014 the appellant was again released from immigration detention.
27. On 3 September 2014 the appellant lodged additional further submissions challenging the decision to deport him.
28. On 4 September 2014 valid emergency travel documents [ETD] were obtained from the DRC officials in Kinshasa and a valid ETD was issued which was valid until 22 February 2015.
29. On 2 August 2016 the ETD's were revalidated and extended until 2 February 2017.
30. On 23 June 2017 the appellant's further submissions for asylum were refused. It is that refusal that gives rise to the current appeal. The grounds of appeal appear to have been settled by the solicitors Broudie, Jackson and Canter and appear to have been faxed to the Tribunal on 6 July 2017. The appeal was listed to be heard on 10 August 2017 with the preliminary hearing set for 27 July 2017.

The appellant failed to attend the preliminary hearing of 27 July and there was no representative for the appellant in attendance either.

31. There is a letter from Broudie, Jackson and Canter dated 10 July 2017 indicating that now their work for the appellant was complete, his paper would be stored and kept for 6 years. Whilst I appreciate that there were ongoing family and High Court proceedings, there appears to be no explanation as to why the solicitors were not acting in the continued immigration proceedings.
32. By letter dated 3 August the appellant applied for an adjournment principally on the basis that he could not find legal representation. That application was refused.
33. By letter dated the 4 August 2017 the appellant indicated that he was relying upon the following documents:-
  - i) his statement
  - ii) the birth certificates of 3 of his children
  - iii) Letters from the Congo embassy
  - iv) Home Office letters from 2009 and 2011
  - v) letters to work preparation team with response
  - vi) letters from Liverpool Family Court
  - vii) further letters to the Home Office
  - viii) High Court correspondence
  - ix) request for an adjournment
  - x) Letters from Broudie Jackson and Canter.
34. There was no indication that any other members of the appellant's family were to give evidence. The appellant attended for the hearing on 10 August 2017 and renewed his application for an adjournment. That application was refused.
35. It is quite evident from the history of this matter that the appellant has been making further submissions to the Respondent and to the Tribunal throughout. He has had a full hearing of his claim to international protection and his human rights on 2 occasions. The issues therein have been canvassed fully and have been dealt with.
36. However where the respondent makes an immigration decision, even if that is the 3<sup>rd</sup> in a series, an appellant is entitled to appeal against that decision and have that appeal case fairly and justly dealt with. It has to be noted that it is as a result of the further submissions made by the appellant that that further appeal arises. It was for the appellant to submit the evidence to substantiate that since the last decision the circumstances have so materially changed that the appellant is now entitled to the relief sought.

37. In argument before me the appellant's representative sought to argue that the appellant would be prejudiced by reason of the fact that he would not understand the principles set out in Devaseelan 2002 UKAIT 00702. The effect of the case law cited is that the previous decisions would be the starting point, unless further evidence had been submitted to bring into question the findings of fact made. As the previous decisions would be the starting point the judge would be building upon those previous decisions in considering what changes had occurred to the circumstances of the appellant of the circumstances in the appellant's home country that brought into question the previous findings. The evidence that the appellant was seeking to rely upon and submit related to his family members in the United Kingdom. He had had ample opportunity to call those witnesses in the past hearings. The one change in the situation was that the appellant was seeking allegedly to rely upon his partner or girlfriend to give evidence but she was allegedly too ill to do so. However no medical evidence had been produced in respect of the lady, no statements and indeed even before me in the Upper Tribunal there was no medical evidence or statement. Indeed there was no further evidence submitted on the appellant's behalf not application to admit such evidence.
38. The appellant has claimed that his previous legal representatives gave him notice that they were not going to act for him as of 10 July. By the time of the application of 10 August there is no evidence that the appellant had taken any steps to obtain further legal representation. As stated the appellant had made an application for an adjournment which had been refused prior to the hearing itself.
39. On the day of the hearing and on the case being called on the appellant indicated that he wanted an adjournment in order to enable him to call his mother and siblings. In part the reason given for not being able to call his mother was that she was working. Whilst it does not appear on the face of the decision it is certainly recorded when it was examined the mother appeared to be working in a school as a dinner lady and it was holiday time. No explanation has been given why the appellant did not have letters or statements from the individuals concerned explaining why they could not attend. There had been statements from some of his siblings in the past.

#### Legal framework

40. In exercising the power to grant an adjournment Rule 2 and 4 of the Tribunal Procedure Rules 2014 are relevant. They provide: -
- 2 *Overriding objective and parties' obligations to cooperate with the Tribunal***
- (1) *The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
- (2) *Dealing with the case fairly and justly includes-*

- a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated cost and the resources of the parties and of the Tribunal;*
- b) avoiding unnecessary formality and seeking flexibility in the proceeding;*
- c) ensuring, so far as is practical, that the parties are able to participate fully in the proceeding;*
- d) using any special expertise of the Tribunal effectively; and*
- e) avoiding delay, so far as compatible with proper consideration of the issues.*

#### **4 Case management powers**

- (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.*
- (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction*
- (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may-...*
  - (h) adjourn or postpone a hearing*

...

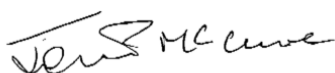
- 41. The appellant's representatives are seeking to assert that in accordance with the overriding objective the case could not be decided justly and fairly. The appellant's representatives seek to rely upon the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418. It has to be noted that the case is based upon the 2005 Procedure Rules. However it is suggested that the principles set out in the case are applicable in the present case.
- 42. In Nwaigwe the representatives of the appellant's representatives had written to the Tribunal indicating that the appellant was ill and could not attend the hearing. The judge had heard the appeal but in so doing had considered whether there was good reason to adjourn and not the element of whether the appeal could be fairly and justly determined [see paragraph 10]. The judge had accordingly failed to apply the dominant test of fairness and had misdirected himself.
- 43. In the present circumstances the issue of whether to adjourn or not was considered by Judge Herwald in paragraphs 2 to 5 of the decision. The judge satisfied himself that there was no good legal reason to adjourn the case. The appellant had had ample time that the case in order, to ensure that he was represented and to ensure that witnesses attended the Tribunal.



44. Even by the hearing before me there were still no statements from the witnesses and it was still being asserted that the appellant's partner was too ill to attend.
45. Judge Herwald properly considered the issues and was entitled to conclude in the circumstances that there was no good reason why the appellant could not have obtained legal representation before the hearing and in any event there was no reason why the witnesses could not have submitted statements in support of the appellant's case. In the circumstances there was no good reason for granting the adjournment.
46. Further the judge considered whether or not case could be justly decided was satisfied that the case could be justly decided on the basis of the evidence before him. The judge has considered whether or not he could justly deal with the appeal and was satisfied that it was just to deal with the appeal on the basis of the evidence thus far lodged including the papers that had previously been before the Tribunal.
47. In the circumstances the judge was entitled to proceed with the hearing in the manner that he did. There is no material error of law in the decision.
48. With regard to the second ground of appeal, it was accepted that that was dependent upon finding that the appellant had not had a proper opportunity of preparing his case by reason of the refusal of the adjournment. In the circumstances I have considered the 2<sup>nd</sup> ground of appeal but find that the judge has acted upon the evidence that was before him was entitled to make the findings of fact that he did. There is therefore no error of law in the judge's approach to the evidence.
49. For the reasons set out there is no material error of law in the decision.

**Notice of Decision**

I dismiss the appeal.



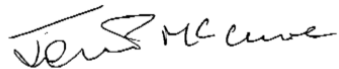
Signed

Deputy Upper Tribunal Judge McClure

Dated 23<sup>rd</sup> February 2018

**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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings



Signed

Date 23<sup>rd</sup> February 2018

Deputy Upper Tribunal Judge McClure