



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

Appeal Number: HU/13520/2018

**THE IMMIGRATION ACTS**

**Heard at The Royal Courts of Justice**  
**On 29 October 2018**

**Decision & Reasons Promulgated**

**On 02 April 2019**

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**MR DANYLE SHAQUILLE (AKA DANYLE SHUKHEIL) SMITH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Jones, Counsel, instructed by Thompson & Co  
Solicitors (Wimbledon)

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

The appellant is a national of the Bahamas who was born on 22 November 1992. On 19 July 2004 he entered the UK as a dependant of his mother and was granted leave to remain until 31 March 2006. Just over two months later, on 2 June 2006, he was granted further leave until 31 October 2007 in line with his mother. A further application made a month before the expiry of this leave was refused, as was an application which had been submitted on 2 October 2007. The appellant's mother appealed against this decision but her appeal was dismissed on 16 April 2008. Neither the appellant's mother nor the

appellant made any further applications and accordingly he has, since 2008, had no leave to remain in the UK.

On 14 October 2013 the appellant was convicted of an exceptionally serious offence of aggravated burglary for which he was sentenced to eight and a half years' imprisonment. As is clear from the sentencing remarks, both knives and an imitation firearm were used in the course of the burglary. The judge's sentencing remarks include the following:

“... The victim was at home on the premises when you attacked. Violence was used and threatened against the victims and included a weapon. One was cut, albeit not seriously, with a knife and the gun, as I say was drawn and pointed”.

It was, as the judge found, a “gang attack”.

On 23 May 2016 the appellant was served with a Notice of Liability to make a Deportation Order and, absent representations from the appellant, a deportation order was signed on 19 January 2017 and served on the appellant together with the reasons for his deportation on 23 January 2017. Absent reasons why the appellant arguably fell within one of the exceptions set out within Section 33 of the UK Borders Act 2007, by Section 32(5) of that Act, the respondent was obliged to make a deportation order, because the appellant had been convicted of an offence and been sentenced to a period of imprisonment of over twelve months.

After the deportation order had been made, in an email sent on 30 June 2017 by a lady called [N], who was claiming to be the appellant's partner, the appellant made representations to be allowed to remain, which the respondent treated as an application to revoke the deportation order which had been made and to be allowed to remain on Article 8 grounds (which would constitute an exception to automatic deportation, under Section 33 of the UK Borders Act). However, in a detailed decision letter dated 12 June 2018, the respondent refused to revoke the deportation order, and refused the Article 8 claim, on the basis that the appellant's deportation would not breach the UK's obligations under Article 8 “because the public interest in deporting you outweighs your right to private and family life”. The respondent in this decision had regard to the relevant Immigration Rules (in particular at paragraph A362 and paragraphs A398 to 399D) and also to Part 5A of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014).

The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge M A Khan sitting at Harmondsworth on 19 July 2018.

In a Decision promulgated on 13 August 2018, Judge Khan dismissed the appeal. The appellant now appeals against this decision, leave having been granted by Designated First-tier Tribunal Judge Shaerf on 31 August 2018.

The basis upon which Judge Shaerf granted permission to appeal is that it was arguable that there had been sufficiently serious procedural and other irregularities that the decision would have to be remade.

Some of these procedural irregularities overlap. The first instance of procedural unfairness alleged within the grounds of appeal is that the appellant had not had an opportunity of seeing the respondent's bundle in sufficient time to prepare for the hearing. As Judge Shaerf notes when giving his reasons for granting permission to appeal, that bundle is dated 9 July 2018 and was received at Harmondsworth on 12 July, which is some seven days before the date of the hearing. However, the appellant was at that time detained at IRC Morton Hall in Lincolnshire, and he had already applied for an adjournment, which request was received at Harmondsworth on 9 July, the same day that the respondent's bundle is dated.

This complaint overlaps the complaint that the hearing should have been adjourned, primarily because the appellant had not had a proper opportunity of considering the case against him and wanted to adduce further evidence. Further, in his decision, Judge Khan does not even mention that an adjournment request had been made, let alone give his reasons for refusing an adjournment. The judge failed to do so even though in his Record of Proceedings he had noted that at the start of the hearing the appellant had applied for an adjournment, referring to the late service of documents on him. This was a hearing at which the appellant was not represented.

The grounds also complain that the judge refused to allow the appellant to provide any documents at the start of the hearing, although there is no reference to this in the Record of Proceedings, or in Judge Khan's decision. As the appellant was not represented at this hearing, there is no other way of knowing whether in fact such an application was made.

There are other aspects of the judge's Decision which were also criticised within the grounds, which criticism has been echoed in Judge Shaerf's Reasons. Although technically the decision had been a refusal to revoke the deportation order, at paragraph 1 of his decision, Judge Khan states that: "The appellant appeals against the respondent's decision of 19/01/2018 made under Section 32 of the Borders Act 2007 seeking to deport the appellant as a foreign criminal". The actual decision under challenge, which was to refuse his human rights claim and also refusing to revoke the deportation order which had previously been made, was dated 12 June 2018. As Judge Shaerf notes, "it is regrettable the judge failed to identify correctly the decision under appeal".

Another difficulty with the decision is that although this was a challenge to a deportation decision (that is, the refusal to revoke the deportation order) and although the judge refers to Part 5A of the Nationality, Immigration and Asylum Act 2002, he failed even to mention Section 117C, which contains the applicable provisions which have to be considered by a judge when considering deportation appeals.

## **Directions**

Following the grant of permission on 3 September 2018, the Tribunal gave directions in this case, which were signed by the Resident Judge. These were sent to the parties and included the following:

“ ...

4. There is a presumption that, in the event of the Tribunal deciding that the decision of the FtT is to be set aside as erroneous in law, the re-making of the decision would take place at the same hearing. The fresh hearing will normally be based on the evidence before the FtT and any further evidence submitted (see [5] below), together with the parties' arguments. The parties must be prepared accordingly in every case.
5. The Tribunal is empowered to permit new or further evidence to be admitted in the re-making of a decision. In any case where this facility is sought the parties must comply with Rule 15(2A) which is in these terms:

*'In an asylum case or an immigration case -*

*(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party -*

*(i) indicating the nature of the evidence; and*

*(ii) explaining why it was not submitted to the First-tier Tribunal; and*

*(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.'*

A failure to comply with Rule 15(2A) will be regarded as a serious matter and may result in fresh or further evidence not being considered by the Tribunal.

...”

## **The Hearing**

On behalf of the appellant, Mr Jones told the Tribunal that his instructions were that the appellant had been seeking to provide witness statements, OASys Reports, third party reports and medical evidence. These were the documents which the judge had not permitted him to adduce.

In answer to a question from the Tribunal as to whether he had prepared a bundle for this hearing (even out of time) Mr Jones replied that he had not, but that the appeal was proceeding on the basis of procedural unfairness.

When asked how the appellant's appeal could possibly succeed, Mr Jones accepted that the appellant did not come within the exceptions set out within Section 117C of the 2002 Act (which mirror the exceptions referred to in the rules), and so would have to rely on very compelling circumstances over and above these exceptions. The question was whether the adverse findings the judge had made were sustainable. It was the appellant's case that the judge

had not properly considered the risk of his committing further offences, when finding at paragraph 35 that: “There is a very high risk that this appellant would go on to commit more serious crimes in the UK”.

When asked by the Tribunal what exceptional circumstances were said to exist, Mr Jones replied that if reports were given to the Tribunal whatever they said should be taken into account. It was possible that a probation report would say that there had been a change of circumstances. The judge’s finding at paragraph 33 that he had limited ties in the UK because he had failed to make any mention of any other family in this country and only one other person had come with him to the hearing to support him was subject to challenge.

The procedural irregularity was that the appellant had not been given an opportunity to put his case. There had been no mention in the decision of why an adjournment was refused, and the judge had made adverse findings against the appellant because of his failure to provide evidence (at paragraph 33), which in the circumstances was unfair. The appellant relied on the decision of Moses LJ in *ML (Nigeria)* [2013] EWCA Civ 844 (a case involving the same judge) where the Court of Appeal had held that even if an appellant’s case appeared difficult, he still has a right to make that case. He was entitled to a fair hearing, even if his case was on its face a weak one. When a Tribunal came to consider the strength of the appellant’s ties in the UK, the low risk of his reoffending and all matters which might arise in a report taken together, the appellant might be able to show very compelling reasons why he should not be deported.

On behalf of the respondent, Mr Duffy first of all asked the Tribunal to note that there was in fact an OASys Report on file which showed that this appellant presented a medium risk of reoffending but a high risk of harm to the public. Mr Duffy accepted that the judge’s failure to give reasons why he had refused an adjournment (or even to mention within his Decision that such an application had been made) was a procedural error; the appellant was entitled to know what the case against him was and needed to see the respondent’s bundle in order to do so. However, although the failure to engage with the adjournment request was procedurally wrong, it was difficult to see how this appeal could possibly have succeeded under paragraph 399A of the Immigration Rules, and so the procedural error was not material in the circumstances of this case.

### **Discussion**

I reserved my decision, but immediately following the hearing I read through the file and my notes of the hearing, and reached a provisional view of what my Decision would be. Regrettably, the file was then mislaid and my Decision was not finalised. However, the file has now been located and I now give the decision I had originally intended to give, but much sooner. The Tribunal apologises to the parties for the delay.

As accepted on behalf of the respondent, during oral argument, it was clearly a procedural error not to give reasons why the request for an adjournment was

refused. Furthermore, in the circumstances of this case, where the unrepresented appellant had not been served with the respondent's bundle in sufficient time to allow him to prepare for the hearing (because the bundle was apparently served at Harmondsworth whereas the appellant was at the time detained at IRC Morton Hall) it would have been the interests of justice to grant the adjournment at the very least to enable the appellant to know what case he had to answer. It was further a procedural irregularity that the appellant had not been served with the respondent's bundle before the hearing, and would have been so even if the application for an adjournment had not been made.

At paragraph 5 of the grounds, it is said that the appellant "wanted more time to get witness statements, probation reports, OASys Reports and medical documents" and that the appellant had requested this at the start of the hearing, but there was no mention of this in the Decision.

The appellant clearly did not have a fair trial, because he had not had sight of the evidence against him, and had had no reasonable opportunity to present his case. In these circumstances, it is not sufficient to say that any irregularity was not material because the appellant's case was so weak anyway that this irregularity made no difference. This Tribunal must have regard to what was said by Moses LJ in *ML (Nigeria)* (referred to above) as follows, at paragraph 14:

"As a second limb, as I have hinted, [Counsel for the respondent] said that, even if there were these errors, there is no point in sending this case back for a further hearing. But so bad was the decision that, 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 deserving respect if a decision which is so flawed is allowed to stand".

Accordingly, the decision will have to be remade, but, as Judge Shaerf noted at the conclusion of his reasons for granting permission to appeal, "the appellant should note that grant of permission is no indicator of the eventual outcome".

Although the appellant had not had a reasonable opportunity either of considering the case against him or of presenting his own case at the hearing before Judge Khan, that is not the situation before this Tribunal. The directions were very clear; if the appellant wished to rely on any further evidence, this evidence had to be served prior to the hearing together with an explanation (which in this case would undoubtedly have been accepted) as to why that evidence had not been before the First-tier Tribunal. It is notable in this case that no further evidence was relied upon and furthermore it was accepted on behalf of the appellant in oral argument that neither of the exceptions set out within Section 117C of the 2002 Act or the Immigration Rules applied.

Section 117C of the 2002 Act (which in all material respects mirrors the relevant provisions within the Immigration Rules) provides as follows:

**“117C Article 8: additional considerations in cases involving foreign criminals**

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where -
  - (a) C has been lawfully resident in the United Kingdom for most of C's life,
  - (b) C is socially and culturally integrated in the United Kingdom, and
  - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subSections (1) to (6) are to be taken into account where a court or Tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted”.

Clearly neither of the exceptions applies here. So far as Exception 1 is concerned, the appellant has not been lawfully resident in the UK for most of his life; he has been in this country without leave since 2007. Nor has the appellant argued that there would be very significant obstacles to his reintegration back into Bahamas. So far as Exception 2 is concerned, it is not suggested that this exception would apply either.

Further and in any event, of course, as this appellant was sentenced to a period of imprisonment well in excess of four years, the public interest would require deportation even if one of the exceptions applied unless there were very compelling circumstances, over and above those described in the exceptions.

The appellant's case is in reality completely hopeless. Although for procedural reasons Judge Khan's decision had to be set aside, because even the weakest of cases is entitled to be argued, the appellant has now had that opportunity to argue his case, and not only has no further evidence been advanced but the Tribunal has not even been referred to evidence which could possibly be advanced. Whether or not the appellant represents a serious risk of reoffending (which as a matter of fact, according to the OASys Report, he does) is not relevant, because even if he does not represent such a risk, by virtue of Section 117C and the relevant provisions of the Immigration Rules, he must still be deported unless he can show very compelling reasons why he should not. There are none, and so the only decision this Tribunal can properly make is to dismiss his appeal.

**Notice of Decision**

**I set aside the decision of First-tier Tribunal Judge Khan as containing a material error of law and remake the decision as follows:**

**The appellant's appeal is dismissed.**

No anonymity direction is made.

Signed:

A handwritten signature in black ink on a light blue background. The signature is written in a cursive style and appears to read "Ken Craig".

Upper Tribunal Judge Craig  
2019

Date: 26 March