



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/21389/2018

THE IMMIGRATION ACTS

**Heard at: Field House
On: 15 October 2019**

**Decision and Reasons
Promulgated
On: 18 October 2019**

Before

**MR JUSTICE STUART-SMITH
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE KEBEDE**

Between

GREGORY [I]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Uzoechina, Patterson & Co

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

The appellant appeals against the decision of Tribunal Judge Lodge promulgated on 13 May 2019 after a hearing on 26 April 2019 by which the First-tier Tribunal dismissed the appellant's appeal against the Secretary of State's decision of 3 October 2018 refusing his

human rights claim further to the making of a Deportation Order on 2 October 2018 pursuant to section 32(5) of the UK Borders Act 2007

Factual Background

The Appellant was born in Jamaica on 30 June 1978 and is a national of Jamaica. His immigration history is set out accurately in the Secretary of State's Deportation Decision. In briefest outline, the appellant first arrived in the UK on 6 September 2002. He was successively granted 6 months leave to enter and then leave to remain as a student until 31 January 2005. On 13 November 2004 he married [O I], who is a French National. For present purposes it is sufficient to record that in October 2007 he was issued with an EEA residence card that was valid until 10 October 2012. He then applied for EEA Permanent Residence as a non-EEA national, but this was refused. He appealed this decision but his appeal was refused and his appeal rights were exhausted by January 2014. There are two young children of the marriage.

In July 2016 he applied for an EEA permanent residence card as a spouse of an EEA national, but his application was refused on 21 January 2017.

On 6 October 2017 he was convicted at Warwick Crown Court of possession of crack-cocaine with intent to supply. He was sentenced to 4 years 6 months imprisonment.

On 17 January 2018 the Secretary State's Notice of Decision to make a deportation order was served on him. From at least 1 February 2018 he has been represented by solicitors, Patterson & Co. On that date the Solicitors submitted a letter informing the respondent of an intention to make representations on the basis that the appellant was the family member of an EEA National. Subsequently, on 24 April 2018 the Appellant made Article 8 Family and Private Life representations verbally at his prison induction which was treated as a human rights claim.

Put shortly, the Secretary of State's decision rested on the Appellant's conviction and sentence. It included detailed consideration of the Appellant's Article 8 claim, starting with the principle that the public good required the appellant's deportation unless there were very compelling circumstances over and above those described in the exceptions to deportation set out at paragraphs 399 and 399A of the Immigration Rules. The decision noted the absence of evidence of anything other than the bare fact that the Appellant is still married to Ms [I]. In this state of the evidence, the Secretary of State did not accept that the appellant was in a genuine and subsisting relationship with Ms [I] or that she is even residing in this country. The decision noted that there are two children of the marriage, both born in Reunion Island, and noted the absence of any evidence of the

Appellant's meaningful involvement in the lives of the two children. While recognising that the Appellant has established some private life in this country, the Secretary of State did not accept that there were very compelling circumstances which outweighed the public interest in seeing the appellant deported.

The Issues before First-tier Tribunal

The appellant's notice of appeal was lodged on 23 October 2018. It challenged the Secretary of State's decision on the grounds that he has been living in the UK legally since 2004 having married an EEA national in November 2004. It alleges that he has lived and worked in the UK and been a UK tax payer; and that he has family and friends in the UK.

The first issue for the First-tier Tribunal to decide at the hearing was whether the hearing should go ahead, as there was no attendance by the appellant or his representative.

The issue of an adjournment had been raised previously by a fax dated 23 April 2019, from the appellant's representatives on the basis that they were awaiting a probation report and could not say when it would be ready and that they had not been sent the respondent's appeal bundle. They were accordingly not ready to proceed. The adjournment request was considered by Assistant Resident Judge O'Brien who refused the application to adjourn and said that any application should be made at the main hearing.

The background, as recorded by the Judge, was set out at [7] to [17] of the Judgment, as follows:

“7. With regard to the appellant I have an email dated 25th April 2019. That email states that the appellant informed the prison guards that his hearing had been adjourned and he did not need to attend. It would seem the prison was informed that that was not the case. The prison then replied stating that the appellant having been informed of that was stating that he was refusing to attend the hearing. The prison indicated that they have used their best endeavours but he has refused to attend the hearing.

8. With regard to the representative's non-attendance I have a fax dated the 23rd April 2019. The representatives indicate that there is a Probation Report they wish to rely on, it is not ready and they cannot say when it will be ready. They also indicate the respondent's bundle has not been sent to the appellant. Having regard to those two difficulties they are not ready to proceed.

9. Assistant Resident Judge O'Brien considered that letter and application but nonetheless refused the application to adjourn indicating that such an application should be made at the substantive hearing. He mentioned the Probation report noting the there was still no explanation as to why a Probation report would assist the tribunal.

10. Today, the day of the hearing, I have received a fax dated 25th April 2019 emphasising that the central concern of the representatives is the non-receipt of the respondent's bundle and adding that there is no burden on the appellant to explain how the Probation Report would assist his case. The representatives go on to say that they are acting pro-bono and so are not in a position to travel from London to Nottingham. Again an adjournment is requested.

11. A note at the bottom of the letter states that the appellant has contacted the representatives from prison indicating that the prison are trying to transport him to the hearing centre. The letter continues "I advised him that the hearing was unlikely to go ahead as I was still waiting for a decision on the application. Therefore, in reliant (sic) on this advice, it is unlikely the appellant will be brought to (sic) Tribunal tomorrow".

12. Miss Simbi for the Home Office opposed the application to adjourn. She said that according to her records the appellant had been served with a Home Office bundle on the 13th March 2019. That the Home Office bundle in any event contained nothing that the appellant would not be aware of. She added that the solicitors clearly had the reasons for refusal letter and that letter contained everything the respondent was relying on. That the proper procedure would have been for the appellant and his representative to attend the Tribunal as they were directed to and make an application to adjourn if at that point they were unable to proceed with the hearing.

13. I gave this matter anxious consideration. I noted that within the bundle is a CMR review. In that review completed on the 12th April 2019 the appellant's representatives indicate that they are ready to proceed, Q3. There is a reference to the appellant seeking an expert report from the Probation Service, Q6. Funding is said to be in place, Q6(d).

14. There is a note from the Tribunal Clerk on the same day which states that the representatives have indicated they are not ready to proceed because of the absence of the Probation Report. The note states they have not provided reasons as to why that report is necessary.

15. I am satisfied the appellant has had the Home Office bundle. The representatives never raised the issue of the absence of the bundle at the CMR on the 12th April 2019. The only issue raised is with regard to the Probation Report. In any event, the Home Office bundle, as Miss Simbi said, contains very little that is not covered in the reasons for refusal letter. I am satisfied it was incumbent upon the appellant's representatives and the appellant to attend the hearing and to identify any problems which the failure to timeously serve the Home Office bundle has caused or the lack of a Probation Report.

16. I cannot find in any event that the Probation Report would be likely to be of any significant assistance. This is a case where the appellant falls into category A. He has received a sentence of over four year's imprisonment. Any rehabilitation undertaken will

only have a marginal impact on any decision I have to make. The appellant's representatives have had the opportunity to say why a Probation Report would significantly advance the appellant's case and have failed to do so.

17. It would seem, in the face of it, that the appellant's representatives have effectively encouraged the appellant not to attend the hearing. I am not happy that they have failed to attend the hearing themselves. The CMR indicates that they are in funds contrary to the letter saying that they are acting pro bono. Whatever is the position with regard to funds it is still incumbent upon the appellant's representatives to have attended the Tribunal in the light of the direction from the Tribunal."

Accordingly, the judge proceeded with the hearing in the appellant's absence.

Turning to the substantive challenge to the decisions of the SSHD, the Judge reviewed the matters relied upon by the SSHD and concluded that he had not been provided with any satisfactory evidence in support of an Article 8 claim that would outweigh the public interest in deporting the Appellant. In these circumstances, he dismissed the appeal.

The appellant then sought permission to appeal Judge Lodge's decision.

The Appeal to UTIAC

The Appellant's skeleton argument submitted for the appeal hearing summarises his grounds of appeal as follows:

- i) The refusal of the adjournment application was unfair and unjust disposal of the appeal;
- ii) The consideration of the appeal and dismissal under Para 339 and 339A [sic], was unlawful and inconsistent with the applicant's right as a family member under the Immigration (European Economic Area) Regulation 2016.

Fairness of the Decision to Adjourn

The Appellant's skeleton argument and submissions took issue with the chronology set out by the judge at [10] above, which has caused us to re-examine the case file. The actual chronology is as follows:

- iii) On 29 January 2019 the First-tier Tribunal sent the parties notice that there would be a pre-hearing review and hearing on 12 April 2019 with a direction that the appellant was to complete the accompanying reply notice by 10 April 2019. Notice was also given that, if the appeal proceeded to a full hearing, the hearing would be on 26 April 2019;

- iv) The appellant's solicitors returned the Reply to the Notice of Hearing by fax on 5 April 2019. They answered Question 3 ("Is there any reason why you will not be ready to proceed with the Full Hearing on the date given in the "Notice of Pre-Hearing Review and Hearing?") by ticking the "yes" box. In answer to Question 4 ("Is there anything in your personal or family circumstances in the United Kingdom, or abroad, that you have not told the Respondent and that you wish to raise to rely upon at the Full Hearing?") they ticked the "yes" box and added that "the appellant's spouse is pursuing an application for confirmation of her and Appellant's right to permanent residence having been married to EEA spouse since 2004. Confirmed, this would have determinative effect on the outcome of the appeal." The solicitors said that it was intended to call two witnesses in addition to the appellant, including Ms [I], whose address was given as being in Coventry. In answer to section 6, the solicitors said that they intended to submit expert evidence in the form of a probation report and a medical report but, in answer to question 6D, said that they did not have funding for the expert evidence. They said the expert evidence was anticipated to be ready by 30 July 2019. In section 12 the solicitors said that they had been authorised to represent the appellant but that all necessary financial and other arrangements had not been made to enable the solicitors to have conduct of the matter including the Full Hearing.
- v) On 12 April 2019 the pre-hearing review was carried out. A form summarising the appellant's Reply to the Notice of Hearing was completed by a Tribunal Caseworker. It is evidently this form that the Judge was referring to in [13] of the determination. Unfortunately for all concerned, the summary was inaccurate in two important respects because it recorded that the appellant was ready to proceed (when the solicitors had said in answer to Question 3 that they were not) and that funding was in place for expert evidence (when the solicitors had said in answer to Question 6D that it was not).
- vi) The Tribunal Caseworker created a separate note of directions on the same day stating (as recorded by the Judge) that the solicitors had in fact said that they were not ready to proceed to the full hearing. The note pointed out that Section 3 specifically requires the appellant to explain why more time was needed, and that this had not been done. It noted that there was reference to a probation report being awaited but said that "it is not for the Tribunal to presume that this is the cause of the delay". No mention was made of any medical report or the absence of funding. The note concluded by saying that "the appeal will accordingly remain as listed until such time as the requirements in section 3 above are complied with."

- vii) The direction that we have just summarised was sent to the parties on 15 April 2019. The notice also confirmed that the Full Hearing would be on 26 April 2019 in Nottingham.
- viii) A further notice was sent to the solicitors confirming the date of the Full Hearing. It noted that the Tribunal had not received any bundle of documents for the appellant.
- ix) On 23 April 2019, the solicitors wrote to the Tribunal in an attempt to comply with the requirement that they explain the cause of the delay. The solicitors said, first, that the probation report was not ready and that they could not say with certainty that it would be ready by 30 July 2019; and, second, that they had not been sent the Respondent's bundle. They submitted that the substantive appeal hearing was not ready to proceed in the absence of the Respondent's bundle and the probation report. They therefore asked for the direction of 15 April 2019 to be set aside and for the substantive hearing to be relisted at the first opportunity after 30 July 2019;
- x) On 24 April 2019 Assistant Resident Judge O'Brien directed that any application to adjourn should be made at the substantive hearing addressing the questions how a Probation Report would assist the Tribunal and whether the Probation Service had agreed to provide one;
- xi) On 25 April 2019 the Tribunal was informed by the prison that the Appellant was "refusing" to attend court because (he said) his case had been adjourned and he did not need to travel;
- xii) Also on 25 April 2019 the solicitors wrote to the Tribunal applying for an adjournment on the basis that (1) Judge O'Brien had not directed his mind to the absence of a Respondent's bundle, (2) the direction of 15 April 2019 had not required them to explain the benefit of a probation report, and (3) because they were representing the appellant pro bono and as a sole practitioner, they were not able to travel to Nottingham at their own expense to make a further application for an adjournment. It was submitted that failure to provide the Respondent's bundle to the solicitors meant that they could not prepare for the appeal hearing and would deny the appellant a fair hearing. The solicitors confirmed that they had told the appellant on 24 April 2019 that the hearing was "unlikely to go ahead", which may explain his reported refusal to travel.

At the hearing today, the solicitor assured us that the respondent's bundle had still not been received. When asked why no obvious steps had been taken to submit evidence to the First-tier Tribunal in light of the projected hearing on 26 April 2019 and the directions that had been given, he submitted that he could not effectively advise his client on what documents or other evidence should be put in until he had seen what was in the respondent's bundle. This would apply whether the

contents proved to be contentious and complex or merely matters of which the appellant was already aware and could address easily.

The situation that has arisen is cause for concern. The stated reasons for the First-tier Tribunal's decision not to adjourn were wrong in at least two respects, namely the belief that the solicitors had said in early April 2019 that they were ready to proceed and that funding was in place. In the light of the solicitors' assurance today about non-receipt of the respondent's bundle Mr Lindsay, who appears for the respondent, fairly accepted that although he had not found anything to indicate that the respondent's bundle had *not* been sent, mistakes can happen in a large organisation. There is also the possibility, which cannot be wholly excluded, that the bundle was sent but went astray for some unknown reason. In any event, we are minded to accept today's assurance from the solicitor in the absence of compelling evidence to the contrary. On that basis, there were three respects in which the basis for the refusal for the adjournment was erroneous.

We note in passing that it seems to us to be highly unsatisfactory that a solicitor should take on the responsibility of representing someone in a case of such importance to the client as this appeal is to the appellant if he is not able to represent the person fully and properly. That must involve and include compliance with directions from the Court and, in particular, attendance to represent the client at properly listed hearings. While we have sympathy with the financial implications for a sole practitioner of travelling significant distances when acting pro bono, we cannot escape the concern that the absence of the solicitors at the listed full hearing in this case may have acted to the detriment of the appellant. This applies not least in relation to the renewed application for the adjournment: we can only suspect that the Judge may have taken a different view of the significance of the respondent's bundle if the solicitor had been there to explain his position and give his assurance in person as he did to us.

Does any of this render the adjournment and subsequent hearing unfair so that the determination should be set aside? For the respondent, Mr Lindsay submits that the appeal was bound to fail for want of evidence of a genuine and subsisting relationship with his wife. Conversely the appellant's solicitor submits that the appeal should have been bound to succeed and should have succeeded below on the basis that the Part VA of the Nationality, Immigration and Asylum Act 2002 and paragraphs A398 and 399A do not apply.

It is possible to question the materiality of a probation report and to downplay the possible significance of the appellant and his representatives not having seen the respondent's bundle. However, one central issue was whether the appellant and his wife were in a genuine subsisting relationship. Another was whether there was a

subsisting parental relationship between the appellant and the two children of the marriage. To that end, the appellant had indicated his intention to call his wife to give evidence. We are not able to predict what the outcome of evidence from his wife would have been; but it clearly had the potential to be material.

At one point in his submissions to us, the solicitor appeared to submit that there was no need for the appellant to adduce evidence about the genuineness and subsistence of his relationship with his wife. This submission is at odds with the statement in the Reply to the Notice of Hearing that the appellant intended to call evidence, including evidence from his wife. We note also that Ms [I] attended the hearing before us. In our judgment, the proper conduct of the appellant's appeal would necessarily involve the calling of evidence about the genuineness and subsistence of his relationship with Ms [I] in order to provide a foundation for his Article 8 claim. In the absence of such evidence, the previous history of his failed attempt to obtain an EEA permanent residence card as a spouse would be evidence adverse to his appeal that would be likely to be accepted, as it was by the Judge in the present determination. Similarly, if there is a subsisting parental relationship with the two children of the marriage, that needs to be evidenced.

The result of the refusal of the adjournment was that no relevant evidence in support of the appellant's case was before the tribunal. While noting the high threshold that needs to be achieved for an Article 8 claim to succeed in circumstances such as these, we cannot exclude the possibility of success in this case if the appeal were properly evidenced and presented. We therefore conclude that, despite the unsatisfactory circumstances that led to the non-attendance of either the appellant, his representative or any evidence before the First-tier Tribunal, the refusal of the adjournment on a wrong factual basis was erroneous and unfair.

We therefore remit the appeal to the First-tier Tribunal to be tried de novo.



Signed:

Mr Justice Stuart-Smith

Dated: 16 October 2019