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

Appeal Number: HU/00402/2015

**Heard at Field House**
**on 13 March 2020**

**Decision & Reasons Promulgated**
**on 19 March 2020**

**THE IMMIGRATION ACTS**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**FANCONY MACIEL FRANCISCO DOS SANTOS**
**(Anonymity direction not made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Paramjorthy instructed by Harding Mitchell Solicitors.
For the Respondent: Mr S Walker Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Feeney who in a decision promulgated on the 10 October 2019 dismissed the appellants appeal.

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**Background**

2. The appellant is a citizen of Angola born on the 18 May 1991.
3. The Judges findings are set out from [21] of the decision under challenge. At [21] the Judge writes:

> 21. In the particular circumstances of this case the appellant has convictions for using threatening, abusive, insulting words or behaviour. He was sentenced to a community order in 2012. The next two offences took place in 2017 for assaulting a constable and a further offence on the same day of ABH for which he received suspended sentences of imprisonment and then in 2018 for failing to provide a specimen for analysis for which he was disqualified from driving for 14 months (reduced if course completed). The refusal letter focused on the Nexus evidence and that the appellant had been convicted of an offence which caused serious harm. Ms Godfrey also sought to argue that this appellant could be considered to be a persistent offender.

4. The respondent made an order for the appellants deportation from the UK on 10 May 2015. The appellant claimed that his deportation will breach his rights pursuant to article 8 ECHR.
5. The Judge noted the appellant accepted his convictions as recorded in the PNC [25].
6. The Judge examines the evidence relating to other relevant police encounters finding on the balance of probabilities that the appellant did rob a victim on 10 August 2009 [27], that the appellant did rape a female on 16 November 2009 [28], that the appellant did rob another victim on 12 October 2011 [29], and that the appellant did commit the offence of common assault battery on 11 August 2013 [31].
7. The Judge did not find the appellant responsible for other offences as detailed at [32 (a) – (h)] for the reasons stated.
8. The Judge at [33] then writes:

> 33. I remind myself that the respondent has made his decision in accordance with the provisions of the 1971 Act. The appellant has received convictions for three offences which have caused serious harm. In addition, relying on my factual findings and the guidance in Andell, I find this appellant's offending behaviour which includes allegations of rape and violent offences (even though not resulting in criminal convictions) has caused serious harm. As a result, paragraph 398(c) applies to him and the public interest requires his deportation unless an exception to deportation applies. I consider these below.

9. The Judge notes there are three children of the family aged 5, 3 and 1 whose best interests are to be brought up by both their parents in the UK [34].
10. When considering paragraph 399A, the Judge finds that the appellant has been in the UK since 2005 when he entered aged 14. At the date of hearing he was 28. When considering whether very significant obstacles exist to integration the Judge writes:

> 38. The appellant in good health. He has experience of work. He lived in Angola until he was 14 years old and he will have some understanding of society and culture.

> He speaks Portuguese and English. He is of working age. He will be able to put his work experience and any skills he has acquired in the UK to good use in Angola. The combination of his skills may be of value in Angola, but he has not made any enquiries about what work might be available there. He may find securing work difficult, but it is not an obstacle that he would be unable to overcome. In terms of integrating at a practical level I find this is something that may be disruptive at first, but the obstacles are not significant. He is young and has no health conditions that will prevent him engaging fully in life there.
>
> 39. He has no family life in Angola and although the existence of friends and family members would assist his integration, their absence does not mean that he would encounter very significant obstacles. There will be a period of adjustment, but he could adjust to life there within a reasonable timescale. His family would be able to support him from the UK until he is able to find accommodation and work so that he can support himself.

11. When considering paragraph 399 (b) the Judge finds the appellant has a genuine and subsisting relationship with his partner whom he found credible. The Judge at [41] finds it would not be unduly harsh for the appellant's partner to relocate to Angola for the reasons set out but, in the alternative, it would not be unduly harsh for the partner to remain in the United Kingdom if the appellant were removed.
12. The Judge finds the appellant's removal would not be unduly harsh upon the children who have support from their mother and other family members in the UK. The Judge, in the alternative, finds it would not be unduly harsh for the children to relocate to Angola with their mother and father either [49].
13. The Judge considers whether deportation is proportionate pursuant to article 8 taking into account section 117 of the 2002 Act. The Judge sets out points in favour of the appellant's removal together with points against at [56 – 57] leading to the conclusion at [58]:

> 58. When weighing these factors, I conclude that there are no very compelling circumstances over and above those described in the exceptions. When assessing proportionality, I conclude the decision to deport the appellant on conducive grounds strikes a fair balance between the appellant's rights and interests and those of his partner weighed against the wider interests of society. It is proportionate to the legitimate end sought to be achieved, namely the prevention of crime and the protection of the public from harm. I find that the Appellant's removal in pursuance of the deportation order would not be a disproportionate interference with his right to respect for his family and private life.

14. The appellant sought permission to appeal challenging the decision of the Judge to fail to adjourn the proceedings and certain factual findings. Permission was granted by another judge of the First-tier Tribunal, the operative part of which is in the following terms:

> 2. It is arguable that the Judge has erred in law (a) by failing to adjourn the Appellant's appeal when the Appellant's previous agents had applied for legal aid in March/April 2019 which had been refused and that they had recently reapplied for legal aid; (b) by assessing the Appellants criminality and finding him guilty based on her own evaluation and assessment on the wrong standard of proof and

(c) which assessment would arguably undermine the Judge's findings in relation to the Appellants Article 8 rights to a family life with his wife and children and the weight given to the public interest.

## Error of law

**15.** The Judge refers the adjournment request at [11] of the decision under challenge where it is written:

> 11. The appellant attended the hearing and asked for an adjournment so that he could instruct a legal representative. I considered the principles of Nwaigwe and decided that it would not be unfair to the appellant to proceed for the following reasons:
>
> a) The appellant's former representatives were no longer able to represent him at the hearing. He approached a new firm in March/April who had applied for legal aid funding, but this had been refused. The firm had resubmitted the same application but as matters currently stand the appellant is unrepresented, has been refused legal aid and there is no indication that he will be able to obtain legal aid funding in the future.
> b) The appellant had the benefit of a full set of bundles that had been prepared for him for his original hearing. The only new matters were the births of two children and some updates regarding his employment. He was able to submit documentary evidence in support and there was no need to adjourn to require him to do so. Ms Godfrey had indicated that she was prepared to accept the birth certificate as evidence that the appellant was the father of the children.
> c) In terms of his family life the only issue in dispute concerned the relationship he had with his partner and she was present at the hearing and was willing and able to give evidence.
> d) He was only relying upon two witnesses, his father and partner. Both witnesses had attended and had provided statements.
> e) He was able to update his statements with hand written notes and clarify any updates during the hearing.
> f) He was fit and able to give his own account about the alleged criminality referred to in the Nexus appeal bundles.

16. The appellant asserts the Judge erred in law as this is an important appeal with issues both complex and comprehensive in detail meaning the appellant was in dire need of legal representation. The grounds assert the Judge gave no reasoning as to why she considered it fair and just for the appeal not to be adjourned to enable the appellant to secure legal representation. The appellant is not legally qualified and had had the benefit of legal representation before the First-Tier Tribunal and the Upper Tribunal when his appeal was originally heard but remitted to be reheard. It was argued is was not fair for the Judge to expect the appellant to understand the issues and represent himself.

17. The claim the Judge failed to give reasons why it was considered fair and appropriate not to adjourn the appeal has no merit as this is precisely what the Judge did as demonstrated above. The Judge considered she was able to obtain best evidence and to conduct a hearing in which the appellant was given full opportunity to discuss the evidence and state his case and explain his view of the matter to the Judge. It is not made out the appellant did not receive a fair hearing.

18. This was not an appeal in relation to which it had been found legal representation was essential as a result of either a complex point of law or disability of the appellant. The fact the appellant may have had representation previously did not automatically entitle him to have the same at the remitted hearing.
19. It transpired from the discussions before the Upper Tribunal that the appellant's previous representatives told him they could look after him no further in November 2018, yet he did not seek the assistance of fresh representatives until March/April 2019 indicating delay of the appellant's own doing.
20. The Judge noted a public funding application had been refused and that the appellant had reapplied but was correct to note there was no indication that the appellant will be successful with that application.
21. Although such issues are fact specific, in *DMK, Petition for Judicial Review of a decision by the Secretary of State for the Home Department* [2012] CSOH 25 The Claimant asked for an adjournment because he did not have a solicitor. The judge refused as he had had sufficient time to instruct legal representation and his case could be justly determined as all of his witnesses were present. The court held that this was not the case of a last-minute withdrawal or other failure by a prior representative. The Claimant had brought his witnesses and did not suggest that there was other evidence that he needed time to gather. It was not unusual for parties to represent themselves before a specialist tribunal. The provision of appropriate assistance to parties in such circumstances was a routine part of the work of a tribunal judge and formed part of their judicial training. Parties did not have any absolute right to be represented at fast track hearings. The Judge had exercised her discretion in a proper judicial manner and her ultimate decision was one which was open to her in the circumstances (para 46).
22. In *HH (Iran) v SSHD [2008] EWCA Civ 504* the judge refused to adjourn to enable the Appellant to find a representative even where the Asylum Support and Resource Team had asked for more time to review the file to decide whether to represent him. The Court of Appeal said that it was common enough for Tribunals to deal with unrepresented claimants if there was no point of law to be decided. Here the simple question was whether the Appellant had given a truthful account and the decision to refuse the application was within the discretion of the judge. Article 6 of the ECHR was not engaged. It was impossible to say that legal representation was indispensable in this case. The state was not compelled to provide the assistance of a lawyer for every dispute involving a civil point in any event.
23. In *R (on the application of Kigen and Cheruiyot) [2015] EWCA Civ 1286* it was held that, following the decisions in Denton v TH White Ltd [2014] EWCA Civ 906 and R (on the application of Hysaj) [2014] EWCA Civ 1633, the fact that a litigant was awaiting a funding decision by the Legal Aid Agency was not a complete answer to his failure to comply with a procedural requirement but was simply a factor to be taken into account. The position was the same in public law and private civil law proceedings.

24. The question to be considered by the Judge was whether it was possible to have a fair hearing without adjourning the application. The finding by the Judge that it was in all the circumstances of this appeal was one reasonably open to the Judge for the reasons given at [11] of the decision under challenge. No procedural error is made out sufficient to amount to an error of law material to the decision to refuse the adjournment request.

25. In relation to the second ground challenging the Judge's findings of fact, it is described as "immensely troubling" that the Judge had conducted a criminal trial of the appellant and found him guilty of the criminal offence of rape, on the balance of probabilities, notwithstanding the alleged victims non-cooperation and the fact the offence was not made out the criminal burden of proof at [28] and in relation to the assessment of the appellant's criminality between [26 – 31]. It is said these errors are fundamental as they undermined the article 8 findings and the public interest question as part of the balancing exercise.

26. The assertion the Judge undertook a criminal trial is a claim totally without merit. At no point has the Judge claimed she was effectively substituting herself for a trial judge in criminal proceedings. The Judge was entitled, as a matter of law, take all the evidence that had been made available into account. The Secretary of State decided that the appellant's deportation from the United Kingdom was conducive to the public good. The obligation upon the Judge was to consider for herself whether on the facts as found, deportation was conducive to the public good. It was for the Judge have regard to the evidence before the Tribunal as was relevant to the question, to assess whether deportation was conducive to the public good. In this appeal, the evidence from Operation Nexus had been disclosed to the appellant and so he was fully aware of the material being considered by the Judge.

27. The appellant fails to provide any authority or reasonable argument to support the contention the Judge was not able to take into account the "non-conviction" evidence or to find, having considered such evidence, that it was established on the basis of the appellant's conduct, character and associations that his actions had reached such a level of seriousness so as to justify the decision to deport. *Bah [2012] UKUT 00196* and *RLP (Bah revisited – expeditious justice) [2017] UKUT 330* considered.

28. The Judge considered this question applying the correct standard of proof to what are civil proceedings, namely the balance of probabilities. Even though the appellant might not have been convicted to the criminal standard this is not a criminal trial.

29. So far as the specific challenge to [28] of the decision is concerned, in that paragraph the Judge writes:

*Rape of female 16 November 2009 CRIS 3038269/9*

> 28. No further action was taken in relation to this offence due to the victims non-cooperation. I am satisfied on the balance of probabilities that the appellant did commit this offence. These are my reasons:
>
> a) The core elements of the victims account of rape were consistent.

b) I acknowledge she did not appear in a dishevelled state and did not appear upset about what she had alleged happened [238] however this does not detract from my findings because victims of trauma react in different ways. In this case the victim was a child, she had a social worker and officers thought her naïve for her age and felt he may have learning difficulties.
c) The victim identified the appellant as the perpetrator.
d) DNA evidence confirmed he had intercourse with her. I appreciate he says this was consensual, but this is at odds with what she consistently told the police.
e) She identified the appellant in an ID parade. He says that she gave police the wrong name and that in fact she is his friend, but this is inconsistent with the fact that she identified him in a parade.
f) The victim did not subsequently cooperate with the police but she received threatening calls and the police referred to 32 missed calls from a telephone number that had previously left threatening messages. Although it is not suggested that the messages were left by the appellant it seems to me that the victim declined to give evidence through fear not, as the appellant claimed, because she realised he was not responsible.
g) If she had realised that she had made a mistake in identifying him as the perpetrator she could have told the police. She did not do so. Further, the appellant provides no reasonable explanation as to why she chose him as the perpetrator from the ID parade.
h) The appellant said he was certain the victim was not underage. However, in the CRIS reports DC Howdle noted the victim appeared very naïve for the average 14 year old [241] and this casts significant doubt on the appellant's claim that he thought she was older. The victim was in fact 16 years of age.
i) This is an account by a witness describing the victim as saying from upstairs "stop, stop, leave me alone" [315]. This is inconsistent with the appellant's claim that sexual intercourse was consensual. A further witness, the homeowner, on being barred from entering the bedroom is said to have said, "let this girl get out of my home".
j) The appellant's explanation as to why the victim did not continue with the case is wholly implausible. He says the victim did not cooperate with the police as she realised the police had arrested him and she knew he was not the perpetrator. When asked why the victim was not here to give evidence on his behalf (the appellant had said they were friends) he said he did not know she would be required and that he had many supporters on the last occasion. I do not think his response is reasonable. The appellant well appreciates the seriousness of the allegations and the potential consequences. I find the victim did not come to support him because she is not a friend as he claims.

30. It was argued on the appellants behalf that the Judge's finding was wrong as the Nexus documents did not contain all the papers available to the CPS and other issues. It was submitted the CPS decided not to prosecute and that the Judge found the appellant had committed the rape without his been able to defend the same.

31. As found above, the appellant was able to participate in the proceedings and was well aware of the documentary evidence before the Judge in the Nexus bundles. There was no application to obtain any further evidence and the Judge clearly considered the material that had been made available with the required degree of anxious scrutiny. Whilst the appellant may not agree with the Judge's conclusions or be happy with the finding that he had committed a serious offence, albeit assessed to the lower civil standard, it has not been made out that finding or those set out between [26 – 31] are not within the range of those reasonably open to the Judge on the evidence.

32. The actual conclusion of the Judge is that at [58] of the decision under challenge set out at [13] above. The grounds fail to establish any arguable procedural error or other material error of law by the Judge in concluding the decision is proportionate and that the appellant's deportation from the United Kingdom is conducive to the public good.

## Decision

**33. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

34. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…………………………………………….
Upper Tribunal Judge Hanson

Dated the 13 March 2020