



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-002976

First-tier Tribunal No:
EU/55053/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27th of September 2024

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FLORIN VASILE

Respondent

Representation:

For the Claimant: Mr M Moriarty, counsel instructed by C & C Solicitors

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

Heard at Field House on 24 September 2024

DECISION AND REASONS

Introduction

1. At the First-tier Tribunal, Mr Florin Vasile was the Appellant and the Secretary of State was the Respondent. For ease in following this decision, I shall refer to Mr Florin Vasile as the Claimant and the Secretary of State as the Respondent. It is the Secretary of State that brings this appeal.

Permission to Appeal

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Hanley dated 22 May 2024, against the decision of the Respondent to cancel the Claimant's leave to remain on grounds of public policy or public security.
3. Permission to appeal was granted by Upper Tribunal Judge Hoffman by way of a decision dated 15 July 2024.
4. The grounds of appeal to the Upper Tribunal are dated 25 June 2024 and are drafted by Samuel Pierce at the Appeals Team of the Respondent. The grounds state, "the SSHD continues to rely on the detailed grounds of appeal within the attached IAFT-4form and respectfully requests that the Upper Tribunal Judge review the merits of these".

Secretary of State's Grounds of Appeal

5. The grounds to the First-tier Tribunal therefore require consideration. The grounds are drafted in an unusual fashion with one ground of appeal which states, "1. *Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or fairness of the proceedings*". Ground 1 then has sub-paragraphs (a) to (e). There is no ground 2, despite the numbering.
6. The sub-paragraphs state in summary that:
 - (a) The Judge's decision to refuse the Secretary of State's request for an adjournment "has caused a situation of procedural unfairness, which has been compounded further by their decision to admit evidence at short notice, against Rule 2 of the Tribunal's Procedure Rules 2014";
 - (b) The Judge said he had concluded the oral hearing and then the Secretary of State's request for an adjournment timed at 10.28am was received from the clerk. The Judge has failed to specify when he finished the hearing, and he could have reconvened the hearing;
 - (c) The decision in *MM (Surendran guidelines for Adjudicators (Kenya))** [2000] UKIAT 00005 supports the Secretary of State's stance that an adjournment should have been granted "due to the matters in dispute in this appeal that only a [Presenting Officer] would be able to test in cross examination";
 - (d) The Appellant's solicitors had uploaded a new skeleton argument and bundle of evidence on 1 May 2024 but both parties must identify the issues in dispute and provide evidence in timely manner which is on the objectives of the CCD Reform; and
 - (e) Taking all of the points collectively, the Secretary of State submitted that the procedural irregularity had a significant impact on the outcome of the appeal.

The Parties' Submissions Before Me

7. In view of the unusual nature of this appeal, I shall refer to more of the submissions than would ordinarily be the case.
8. In his submissions before me, Mr Melvin on behalf of the Secretary of State said in summary that he relied on the grounds of appeal. He said that for some reason, the Secretary of State's team looking at the First-tier Tribunal listings at Taylor House (where the appeal had taken place) had omitted to provide a Presenting Officer for this appeal and the Tribunal brought it to the attention of the team looking after the roster. Judge Hanley said in his decision that he was not encouraging attendance but just remarking it was actually going to be the case that the Presenting Officer was not going to attend.
9. Mr Melvin said in a case such as this when an offence is underlying the appeal, then a Presenting Officer would have normally been in attendance, but the e-mail set out that an adjournment request was made, albeit late. Mr Melvin said that therefore procedural unfairness was being argued and a Presenting Officer would normally have been allocated to an appeal of this nature. Mr Melvin said he placed reliance on the grounds and did not wish to repeat them. He said that there was quite a lot of evidence which was served and which the SSHD had not seen prior to the hearing as it was served with an updated skeleton argument a couple of days before long bank holiday and hearing on Tuesday morning and no application for adducing of new evidence in this matter.
10. Mr Melvin submitted that in this particular case that cross examination would have been beneficial to the Tribunal and Judge Hanley did ask some questions, but there was concern as to the criminality and criminality going forward. The interview was conducted in English, and this would have been a major point.
11. I asked if the standard letter that one sees from the Secretary of State to say that no Presenting Officer would be fielded in front of Judge Hanley was sent in this case. Mr Melvin said he did not know if there was a letter. Mr Moriarty pointed out that paragraph 26 of the Judge's decision stated that he had been advised by his clerk that the Secretary of State had notified the Tribunal that no Presenting Officer would be provided for this appeal.
12. Mr Melvin said that due to constraints that for some 50% of cases at Taylor House, there was currently no Presenting Officer in attendance. Mr Melvin said he did not know if an e-mail or something specific such as a letter had been provided by the Secretary of State.
13. Mr Melvin said that given the lack of representation at current times, he wanted to "make the point that the judge has looked at that and wanted to check with the Presenting Officers Unit are they sure that given the circumstances and unusual appearance where there is criminality, then it was quite surprising that the SSHD was not represented via a Presenting Officer or via instructed counsel". The Judge had checked and elicited the

response at 10.28am, rather than prior to the start of proceedings at 10 am.

14. I sought to ascertain why there had been no Presenting Officer before Judge Hanley and Mr Melvin said that perhaps there was a mistake prior to the hearing, and someone did not look at the case properly as the reference number did not show it. Mr Melvin said he could not provide any documentation. He said that there was an error by the rostering team of the Secretary of State for Taylor House and that a Presenting Officer was not rostered for this particular appeal. He said that “in a nutshell they are my submissions”. He said that the new evidence and lack of cross examination on important issues and the name change was to specifically to avoid the respondent’s systems. The cross examination into contents in the bag, notwithstanding the absconding from Germany, would have been explored at length by a competent Presenting Officer. Mr Melvin said he understood that the Secretary of State would have been notified two weeks ahead of the hearing of its date, time and location. I asked if there was a witness statement to support any of what I was told, but Mr Melvin me that there was not.
15. Mr Melvin said that Appellants are given the benefit of the doubt when they do not attend. In respect of the German evidence, the German authorities were still using the old name, but the Appellant had changed his name and there was the issue of absconding.
16. Mr Moriarty said he relied on a Rule 24 Response. That was a document prepared by Ms Deborah Revill of counsel. She had appeared before the Judge on this matter at the First-tier Tribunal.
17. It is worth adding that an application for an adjournment had been made to me approximately two weeks seeking s re-listing of this matter on a date when Ms Revill could accommodate it because she had public duty which coincided with this hearing. I had refused that application on the basis that alternative counsel could be instructed and because Ms Revill had set matters out in some detail in the Rule 24 response for the Respondent to consider and to reply to if appropriate.
18. I observe that the Claimant’s Rule 24 response to the Respondent’s Notice of Appeal pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 and is dated 8 August 2024 and so has been with the Secretary of State for several weeks prior to this hearing. There has been no response to that document and nor a witness statement or other document from the Secretary of State. Mr Moriarity’s first submission was that there was no challenge to the Claimant’s Rule 24. I observe that Rule 25 specifically permits the Respondent to reply to the Claimant’s Rule 24 response, but the Respondent did not take up that opportunity. I also note that in *VV (grounds of appeal) Lithuania* [2016] UKUT 00053 (IAC) it was made clear that where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in the light of any response from the respondent to the appeal.

19. Mr Moriarity also submitted that the Respondent's grounds did not challenge any of the reasons for allowing the appeal. He said some of the points made were theoretical arguments had the Respondent turned up at the hearing and what might have then been said. There was no challenge to what the Judge had said about what occurred and there was no response by 10am and so the Judge proceeded in the absence of the Respondent. The adjournment application was made at 10.28am. He said it was very ambitious to expect a judge to see such a late application on the day and in any event, there was a lack of clarity about it. In any event, the judge was testing the evidence, and that was in favour of the Respondent.
20. Mr Moriarity said that in reality, there was a conscious decision by the Secretary of State to prioritise other cases over this one. He said that was what the Respondent's adjournment application was about. This was not an application by the Respondent seeking an adjournment to consider documents. In any event, the Judge had considered an adjournment and provided reasons for refusing an adjournment. The Judge did not say he would like representation from the Respondent. That was not for the Tribunal. The Judge gave reasons for refusing the adjournment application. There was just a belated suggestion by the Respondent to get someone there. It is not a case in which application was ignored by the Judge. The Judge had considered it and said it was not in the interests of justice to adjourn.
21. Mr Moriarity also said that the documents were uploaded on 1 May 2024 and the hearing was on 7 May 2024. The Respondent was aware of the documents, and it was to be noted that the adjournment application did not say that there were late documents. The two issues were being conflated by the Respondent in the grounds of appeal and at this hearing. The issue for the Judge was whether he could admit the evidence. These were not false documents or where there was questionable provenance. There were documents from the German authorities, and it was open to the Judge to consider them in the interests of justice.
22. Mr Moriarity concluded by saying that in reality the Secretary of State was saying, "I wish we had sent someone to the hearing", but that was not an error of law by the Judge. Nor did the grounds explain what the Secretary of State would have done differently.
23. In reply to Mr Melvin said in summary that the Respondent's review set out an indication of what the Respondent considered that the appeal needed to explore in cross examination. Namely, the "genuine present and sufficiently serious threat to following fundamental interests of society". Mr Melvin also pointed out that the judge said in his determination at paragraph 26 that the Respondent had informed the Tribunal that no presenting officer would be provided.

Analysis and Conclusions

24. It is a fundamental principle that a hearing must be fair. That is at the forefront of my consideration when assessing the issues in this case. I also have at the forefront of my consideration, although I was not referred to it by the parties, the judgment of Lord Wilson (with whom the other Supreme Court Justices agreed) in *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 W.L.R. 2455. At paragraph 49 his Lordship said,

“Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them.”

25. Procedural fairness is therefore the cornerstone. I remind myself that I must ensure that this is not left out of the account and that requirement of procedural fairness is of a fundamental nature.

26. I turn then to see what occurred. The decision of the Judge is a very detailed one, which sets out the background well and one in which the proceedings before him are also set out well. As an outline it is worth observing that the Judge’s decision covers 15 pages over some 90 paragraphs. It has sub-headings for various aspects of the case, including the decision being appealed, the documents considered, the hearing, the issues to be considered, the evidence, submissions, the legal framework, the burden and standard of proof, findings and reasons, factual findings, a separate consideration of each of the issues identified at the top of the decision, and a conclusion section. The Judge also dealt with the Respondent’s application for an adjournment over 4 paragraphs. I am of course aware that a well set-out and lengthy decision is not necessarily one which is correct, but the presentation of the Judge’s decision is something I note.

27. In my judgment, on any plain reading, it is clear that the Judge provided a very clear, comprehensive and detailed decision. Indeed, it is possible to go further and to say that at paragraphs 34 onwards the Judge partially took on the role of the Respondent by deciding to ask a number of questions. The Judge said,

“I explained that I had a number of questions relating to the chronology of events since the conviction and relating to the appellant’s circumstances in Germany and the UK...I indicated that in the absence of the respondent’s representative I considered it to be in the interests of justice that I ask my questions in full”

28. I am well aware of the decision in *MM (Surendran guidelines for Adjudicators (Kenya))** [2000] UKIAT 00005. The importance of that

decision cannot be downplayed because it is a starred decision. The Tribunal noted in that decision that,

“18. The absence of representatives on behalf of the Home Office has been regularly criticised by adjudicators and the tribunal. While we appreciate the problem created by the increase in the number of cases and the consequential increase in sittings, in an adversial process, which appeals to the IAA involve, it is very difficult for the adjudicator if the Home Office is unrepresented. It is as if in a criminal case the Crown were unrepresented. The adjudicator cannot and cannot be expected to conduct its case for the Home Office. Equally, he will be understandably and correctly reluctant to let what he regards as an improbable account lead to a wrong decision because it has not been tested or all relevant material has not been produced.”

29. That decision is now 24 years old, and I make no detailed comment about the lack of presenting officers in hearings at the First-tier Tribunal even now. If Mr Melvin is correct when he said that 50% of hearings at Taylor House do not have a Home Office Presenting Officer, then that is an issue which perhaps needs consideration elsewhere so that best use of FTIAC and UTIAC Tribunals' time is made.
30. A First-tier Tribunal Judge is not permitted to take over the role of the Home Office Presenting Officer and to undertake, in effect, cross examination. That is clear from numerous authorities because the Judge must not enter the arena. One recent authority which dealt with this issue is *Hima v Secretary of State for the Home Department* [2024] EWCA Civ 680.
31. In my judgment, it is plain to me that at paragraph 34 the Judge onwards in the instant appeal before me was, once, again, seeking to ensure that the proceedings were fair for the Secretary of State, despite her absence from the hearing. He did that by asking the Claimant many questions. He had been put into that position by the non-attendance of a representative on behalf of the Secretary of State.
32. I then turn to the Overriding Objective. That is set out in Rule 2 of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008. This is of such importance that I set it out in full. There is a like provision in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

- (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
- (2) Dealing with a 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 costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Upper Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Upper Tribunal to further the overriding objective; and
 - (b) co-operate with the Upper Tribunal generally

33. It is worth stressing that the heading to the overriding objective and Rule 2(4) makes clear that the parties must co-operate with the Tribunal and help it to further the overriding objective.
34. It is clear from numerous recent authorities that the Tribunal expects that the parties are aware that procedural rigour will be applied. There may well have been a time in the past when procedural rigour was not considered by the parties as a paramount concern because the Tribunal would perhaps overlook failures to comply with procedure or with basic requirements. That is very much history.
35. Be it in the form of the issued focused hearings at the First-tier Tribunal or indeed the Senior President's Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal (May 2022), procedural rigour and focus on the issues is paramount. In this instant appeal, paragraph 4 of the Senior President's May 2022 Practice Direction was not complied with by the Secretary of State. That provides (the bold is in the original version),

4. Adjournments

4.1. An application for the adjournment of an appeal must be made no later than 16:00 one clear working day before the date of the hearing.

4.2. For the avoidance of doubt, where a case is listed for hearing on, for example, a Monday, the application must be received by 16:00 on the previous Thursday.

4.3. An application for an adjournment must be supported by full reasons.

4.4. Any application made later than the end of the period mentioned in paragraph 4.1 must be made at the hearing and will, save in exceptional circumstances, require the attendance of the party or the representative of the party seeking the adjournment.

4.5. Parties must not assume that an application will be successful even if made in accordance with paragraph 4.1.

4.6 If an adjournment is not granted and the party fails to attend the hearing, the Tribunal may proceed with the hearing in that party's absence.

36. I turn to what the Secretary of State chose to do in this case. Firstly, the Secretary of State chose not to attend the hearing and not to field a Home Office Presenting Officer or independently instructed counsel.

37. That was a matter for the Secretary of State to decide and is not a matter for a Judge who has an independent role to hear the case and to decide upon it. In this case though, the Judge took the extra step of inviting his clerk to check to make sure that the Secretary of State was not going to be represented at the hearing. Where the Secretary of State's grounds suggest that the Judge had wanted representation, that it plainly wrong. There was no requirement, procedural or otherwise, for the Judge to make checks via his clerk as to whether the Respondent was going to be represented. The Judge appears to have done so through an abundance of caution and perhaps to prepare some questions he wanted dealing with by the Claimant.

38. Secondly what appears to have happened thereafter is that someone at the Presenting Officer's unit sent an e-mail to the Judge's clerk at 10.28am. That e-mail is set out at paragraph 85 of the Judge's decision. Unfortunately, Mr Melvin could not confirm if that was the complete e-mail because he did not have a copy of it for me. I do observe that at the very least the Secretary of State ought to have provided the documents which were relied upon. The e-mail recorded in the decision states,

"Apologies for the delay in responding to your e-mail.

The respondent has a shortage of cover for priority appeals today and therefore they were utilised to cover the deports and asylum cases first.

As this is a major case and the tribunal would like representation can we ask that the matter is adjourned to the next available date with a direction for the respondent to be presented (sic) at the next hearing”

39. There has been no compliance with the Senior President’s Practice Direction of May 2022 in respect requirements for applications for adjournments. No application was made the day before and there was no attendance to seek the adjournment. Instead, an e-mail based on incorrect assumptions that the Judge wanted representation was sent to the Judge’s clerk some 28 minutes after the time allotted for the hearing. I see no basis on which it can be said that the Secretary of State was complying with or co-operating with the Tribunal or further the overriding objective.
40. I turn to the Rule 24 Notice prepared by Ms Deborah Revill of counsel. As I have noted previously, she was counsel at the hearing before the Judge, but she was not able to attend before me today because of public duty elsewhere today. She helpfully refers to the case law that the test for the Upper Tribunal is not one of reasonableness of an adjournment, but rather whether there was deprivation of the affected party’s right to a fair hearing. In my judgment, it is entirely correct that fairness requires that both parties have the opportunity to be represented, but it does not require that both parties are represented where one party is aware of the hearing and chooses not to attend or prioritises other cases.
41. I also note from the Rule 24 response that the hearing was from 10.08am to 11.28am and so where the Secretary of State’s grounds of appeal contend that the Judge could have interrupted the hearing or where the grounds, in effect, question when the hearing finished and why the e-mail of 10.28am was not considered sooner, the grounds are hopeless.
42. The First-tier Tribunal, like all Tribunals and Courts, across the country, I am sure, rely on the parties to submit their documents and to attend hearings. His Majesty’s Court and Tribunals staff deal with very large volumes of paperwork, be that in hard copy form or digital. In my judgment it is simply unrealistic to expect Judge’s clerks or HMCTS staff to drop everything and to deal with non-attendance of Presenting Officers or parties and to be able to pick up e-mails immediately.
43. The Claimant was convicted when he was aged 17 of a very serious offence involving a robbery which led to death of the victim. This then led to a lengthy 9-year sentence of imprisonment in Germany. These were facts which clearly must have been known to the Secretary of State a very long time ago because the Respondent’s decision was dated August 2023

citing those matters. Similarly, the issues being raised in respect of absconding and the like were all well known to the Secretary of State. I am simply unable to accept that the Secretary of State did not have the required information or that somehow, she was misled with 'late documents' as to the nature of the appeal or its background. The information was always known to the Secretary of State because she referred to in her decision of 2023.

44. Mr Melvin suggested that a mistake had been made in not fielding a Home Office Presenting Officer. During the hearing I posited whether a claimant, a litigant in person, had positively decided not to have legal representation at the First-tier Tribunal, could later succeed on appeal on the basis that he had 'made a mistake and should have obtained legal representation'.
45. The Court of Appeal's judgment in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] I.N.L.R. 633 explains when an appeal on a point of law will be entertained. It has no category which states that failing to attend a hearing with informed awareness of (1) the date of the hearing and (2) what the appeal will consider, can later lead to a successful appeal. If, as appears, what is really being said is 'I wish I had attended the hearing'. That applies to both an unrepresented Appellant and to the Secretary of State.
46. The authorities make clear that the hearing at the First-tier Tribunal or at first instance is not a dress rehearsal.
47. Finality of decisions is also a very important consideration.
48. It is right to say that whilst the Secretary of State will be provided with due respect by the Tribunal, it cannot be that the Tribunal should provide a more lax approach to non-attendance at hearings by the Secretary of State, with later requests by her to set aside decisions when those decisions go against the Secretary of State. Again, the Overriding Objective provides the basis for what the Tribunal expects the parties to do to assist to ensure that the matters are dealt with efficiently.
49. In my judgment it is plain that the Judge was being particularly fair in checking via his clerk that the Respondent was not going to be represented. The Judge then tested the evidence during the hearing. Including with very many questions in respect of the 5 identified topics at paragraph 28 of his decision. Those topics included detailed questions and consideration of whether the cancellation of the Appellant's leave was

justified on grounds of public policy or public security. As the judge noted at paragraph 69 and the Claimant's Rule 24 response highlighted, the Respondent had not relied on anything in relation to the circumstances of the offending, but just on the convictions of 2014 and 2015. The Judge concluded after lengthy consideration of the oral and written evidence, that the Respondent had not shown that the Claimant represented a genuine, present and sufficiently serious threat. That was a decision plainly open to the Judge.

50. In respect of the evidence provided on 1 May 2024 and the skeleton argument, it was wrong for Mr Melville to say that this was uploaded 2 days before the hearing because the hearing was on 7 May 2024. In any event, the Secretary of State had this evidence and knew of it prior to the hearing for at least 3 working days and decided still not to attend the hearing. Nor was there any request in the application for an adjournment of 10.28am on 7 May 2024 for time to consider the 'new' documents. In any event, the documents comprise, in the main, formal court and associated documents from Germany and a skeleton argument. As Mr Moriarity submitted and with which I agree, these were not documents of the type with questionable provenance or the like. Indeed, it appears peculiar that the Secretary of State had not sought such documents previously herself in any event.
51. As the Judge said himself at paragraph 88 of his decision, "It is in the public interest that the tribunal's resources are used efficiently in the just and timely resolution of appeals". That was a perfectly fair approach to the application to adjourn and indeed the Judge's approach to the case as a whole. This included by him seeking to make sure that there was no representation of the Respondent and asking the detailed questions of the Claimant. These all plainly show that the Judge went over and beyond what would be expected of a Judge when conducting a hearing.
52. I return to the overriding objective. That also requires that there is a fair allocation of resources. Be they the resources of the Tribunal or of the parties. Here the Claimant had attended the hearing with his legal representation on a private fee basis. The Tribunal had listed the matter with a fair allocation of resources. It was plainly open to the Judge to decide not to await the arrival of the Secretary of State's representative, and he therefore commenced the case at 10.08am. It was also plainly open to the Judge not to re-convene the case after he had concluded it at 11.28am.

53. I make clear that I am not saying that there can never be the setting aside of a lower court or First-tier Tribunal's decision on appeal. Indeed, there will be cases in which the jurisdiction was wrongly applied at first instance and so on appeal the matter will almost certainly be set aside. Similarly, there might be cases in which one party is unable to reach the hearing on time through illness or serious travel issues and so on appeal the matter is re-opened. None of those examples apply in the instant appeal before me though.
54. In the circumstances I conclude that there is no merit to the Secretary of State's appeal. For the avoidance of doubt, that includes all matters raised in the grounds which I have summarised at paragraph 6 above.
55. In any event, the Secretary of State has failed to provide any adequate grounds upon which it can be said that the Judge materially erred in law in accordance with *R (Iran) v SSHD* principles, whether relating to the 'new' documents or otherwise. The Court of Appeal's judgment in *Volpi v Volpi* [2022] EWCA Civ 464 makes clear that the Judge's decision should not be picked over or construed as though it was a piece of legislation.
56. I therefore dismiss the Secretary of State's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and there was no procedural error.

The decision of the First-tier Tribunal allowing the appeal shall stand.

Signed
2024

Date: 24 September

Abid Mahmood
Judge of the Upper Tribunal