Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/16853/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2019	**On 3 December 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:
For the Appellant: Ms E Griffiths, instructed by Duncan Lewis Solicitors
For the Respondent: Ms S Jones, Home Office Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

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1. I have decided to anonymise the appellant. There is evidence before me concerning the appellant's wife's mental health. I have had regard to Upper Tribunal Immigration and Asylum Chamber Guidance Note 2013 No 1: Anonymity Orders and specifically Rule 14 (7) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The appellant is a citizen of Ghana. His date of birth is 25 July 1981. This is the appellant's application to appeal against the decision of First-tier Tribunal Judge Eldridge to dismiss his appeal against the respondent's decision to deport him. The appellant appealed on the ground that deportation would breach his rights under Article 8. The decision to deport the appellant arose from his conviction of possession of Class A drugs with intent for which he was sentenced to 42 months imprisonment. The appellant was convicted and sentenced on 2 November 2016. Judge Eldridge found that the appellant has a genuine and subsisting relationship with his partner, JA, and their children, but that deportation would not be unduly harsh and that the decision to deport him was a proportionate interference with his family and private life.

3. Permission was granted to the appellant on 5 June 2019 by FTTJ Boyes on all grounds.

4. I found that there was procedural unfairness and therefore that the first ground was made out. I communicated this to the parties at the hearing on 22 October 2019. Having found that there was procedural unfairness, I set aside the decision of Judge Eldridge and remitted the case to the FTT. Both parties agreed that if I were to find unfairness this would be the appropriate venue for a *de novo* hearing. It is not necessary for me to engage with all grounds.

Error of Law

5. The appellant argued that there was procedural unfairness arising from the decision of the FTT to proceed with the hearing instead of adjourning at the request of the appellant's Counsel, Ms Griffiths. The appellant attended the hearing on 21 March 2019. He asked for an adjournment of the basis that his father-in-law, SA, was not able to attend because he was in hospital having suffered from a "mini- heart attack". JA, (SA's daughter) was not in attendance because according to the appellant she was unable to give evidence without her father being in attendance because she is a vulnerable witness. There was no medical evidence to support the application and it was opposed by the presenting officer.

6. The reasons for the judge refusing to adjourn are set out at [18] and [19]. He said that the appeal had been before the Tribunal for a very long period. He said that if the appellant's partner, JA, was a vulnerable witness this should have been addressed earlier and there would be medical records to support this. He said that nothing had been produced

from the hospital or any medical practitioner as regards SA. The judge concluded that it was fair to proceed, considering that there were witness statements from the two witnesses. He heard evidence from the appellant. Ms Griffiths renewed her application to adjourn at the hearing after the appellant had given evidence on the basis that this was necessary to enable JA to give evidence about the children's best interests and her own medical condition. Again, the application was refused. Judge Eldridge again noted that there was no documentary evidence supporting her condition.

7. At the hearing before me there was a letter of 8 May 2019 from Basildon University Hospital to Dr Deshpande concerning SA. It sets out his medical history including that he has chronic kidney disease and that he was admitted with a chest infection and discharged on 22 March 2019. There was a further statement from JA of 22 October 2019 explaining why she was unable to attend the hearing. She says that she suffers from learning disabilities and anxiety. She finds going to court difficult and overwhelming and struggles to understand complicated matters. She did not attend the hearing because she needed the support of her father.

8. There was a further statement from SA submitted to explain his non-attendance. His evidence is that he was in hospital at the time for 4 days. It was the second time that year that he had been hospitalised for a heart problem although he was initially treated for a chest infection. He was not able to produce the discharge letter having mislaid it. He had to get another letter from the hospital, and he has only just received it (the copy of the letter from the hospital to Dr Deshpande of 8 May 2019).

9. The thrust of Ms Griffiths' argument of was that the judge needed to accede to the request for an adjournment in order to do justice to the appeal. JA could not give evidence in the absence of her father. I queried why this had not been raised before the hearing. I said that it was not made clear from the evidence before the FTT that her vulnerability was to such an extent that she was unable to give evidence without her father's presence. Ms Griffiths said that the issue had not arisen because it was anticipated that they would both be at the hearing. She drew may attention the matter having been previously listed in December 2018 when the appellant and both witnesses attended, but on that occasion the matter had to be adjourned because the respondent's decision was not complete.

10. The respondent's position is that there is no unfairness. There was no medical evidence and there has been no application under Rule 15A of the Rules. In any event, the judge rejected that the appellant's partner had learning difficulties and rejected the proposition that any alleged difficulties had any material impact on her ability to look after the children. In addition, it was accepted that the relationship was genuine

and subsisting between the appellant and JA and the appellant and the children.

11. The further evidence now relied on has not been served in accordance with the directions of the UT. However, I admit the evidence relied on by the appellant to support the assertion of unfairness. I am satisfied that at least part of the new evidence (that supporting SA's hospitalisation) could not have been obtained with reasonable diligence and that the evidence may have had an important influence on the decision to adjourn and the overall outcome and additionally there was no challenge to the veracity of the evidence tending to show that SA was in hospital at the material time. SA in his statement explains why he was not able to obtain evidence of his hospitalisation until a short while ago. He said that he had mislaid the discharge summary. I accept that explanation. I accept that Judge Eldridge reasonably refused the application; however, that is not the issue before me. The criterion to be applied on an appeal is fairness, properly *applying MM (unfairness; E & R) Sudan [2014] UKUT.*

12. I had sympathy with Ms Jones' submission in respect of JA because there was no evidence before the judge that her attendance as a witness was dependent on the attendance of her father. However, I accept that the skeleton argument before Judge Eldridge submitted that that she is a vulnerable witness and that the Joint Presidential Guidance Note 2 of 2010 applied: Child, Vulnerable Adult and Sensitive Witnesses Guidance and Practice Direction. Ms Jones drew my attention to the judge having rejected evidence of "significant" learning difficulties. However, I note that there was evidence in SA's witness statement which was before the judge that his daughter has a form of autism and other health problems and that she has learning difficulties (having been diagnosed when aged 14 or 15). His evidence was that she gets nervous and can be difficult to understand.

13. I have taken on board Ms Jones' submissions in respect of JA. The judge did not accept that her vulnerabilities were significant. There was an absence of independent evidence on the issue and there was no evidence that she was unable to attend the hearing without her father. The appellant relies on post decision evidence from her GP which does not in my view take matters. There was a proper application made under Rule 15A to adduce this statement. The application was refused by an UTJ. The letter (of 23 May 2019) simply asserts that "she has requested a letter to confirm her learning disabilities diagnosis".

14. Whilst I appreciate that an absence of witnesses is not in itself unfair and that the appellant was able to give evidence about his partner and father-in -law, on the facts of this case, I conclude that there was unfairness. Whilst the witnesses had given statements which were before the judge, they had not advanced evidence that JA was unable to attend without her father. I accept Ms Griffiths' submission that this was not something which they foresaw. I also accept that had the witnesses

attended the judge may have taken a different view about the manifestation of JA's autism and learning difficulties. SA in his witness statement which was before Judge Eldridge states that his daughter had learning difficulties (page 5). The judge queried the extent and the implications of this. The evidence now before me may have assisted the judge.

15. The judge had to make an assessment of unduly harsh in the context of JA and her and the appellant's children. The evidence of each witness individually or taken together which was not before the judge, contains evidence material to that assessment. Whilst, the test is a very demanding one, I cannot be sure that had the judge had sight of the evidence now before me, he would have reached the same conclusion.

16. Whilst the matter has been remitted to the FTT to be heard afresh, I make the following observations. There is evidence of SA having health problems. It is unlikely that the FTT will accede to a further application for an adjournment arising from his inability to attend on the grounds of ill health. The solicitors should prepare the appellant's case on this basis. This may require full and detailed witness statements and for another member of the family to attend the Tribunal with JA in the event of her father's absence. If the Tribunal is being asked to make any reasonable adjustments it is incumbent on those representing the appellant to bring this to the attention of the Tribunal in good time for the hearing.

17. The appellant gave evidence at the hearing before Judge Eldridge, parts of which the judge set out (see [51], [53]-[54]). There is no challenge to this. A judge hearing the appeal afresh may properly take account of it. The judge made positive findings about the appellant's family life. Of course, the FTT will have to consider the circumstances at the date of the hearing, but the findings of Judge Eldridge about the relationships that existed between the appellant and his wife and his children (at the date of the hearing before him in March 2019) should be the starting point for an assessment.

Signed Joanna McWilliam Date 2 December 2019

Upper Tribunal Judge McWilliam