Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20668/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 August 2019	**On 5 November 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

B B B
(anonymity direction made in part)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Adophy, Solicitor from Archbold Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant's children. Breach of this order can be punished as a contempt of court. I make this order because there is no legitimate public interest in their identity and publicity about their circumstances might harm them.

2. This is an appeal against the decision of the First-tier Tribunal (First-tier Tribunal Judge Andrew) promulgated on 7 February 2019 dismissing the Appellant's appeal on human rights grounds against a decision of the Respondent on 10 October 2018 refusing him leave to remain subsequent to his being made the subject of a deportation order.

3. The thrust of the grounds of appeal is that the First-tier Tribunal was wrong when it refused an application to adjourn the hearing.

4. As I explain in more detail below, the appeal came before the First-tier Tribunal December 2018 but was adjourned until 4 February 2019 and it is the Decision and Reasons following the hearing on 4 February 2019 that is the subject of this appeal. On both occasions the appeal was listed before First-tier Tribunal Judge Andrew.

5. I begin by looking carefully at the decision that is challenged. Judge Andrew noted that in November 2018 the First-tier Tribunal sent a notice for a pre-hearing review requiring a reply to be received by the Tribunal no later than the end of business on 20 November 2018. A reply was received dated 16 November 2018 asking for an adjournment. The Appellant wanted more time to make further enquiries.

6. Designated Immigration Judge McCarthy conducted a pretrial review and, on 21 November 2018, (by e-mail, confirmed in a formal order dated 22 November 2018) Directed that the matter should remain listed unless better reasons were given in support of the application to adjourn. In particular he ordered that details be provided identifying what reports were being sought and, given that the Appellant's representatives were seeking a report into his mental health, what needed to be done to help the Appellant given his best evidence. The Directions confirmed that the matter would remain listed for half a day unless a different time estimate was indicated. Judge McCarthy further directed that the Appellant should respond no later than 5 p.m. on 30 November 2018 and that evidence served otherwise than in accordance with the Directions might not be admitted.

7. Following this history, the appeal came before Judge Andrew on 7 December 2018. The Appellant did not appear and was not represented. Enquiries were made. It was said then that the Directions given by Judge McCarthy had been answered in a message sent by facsimile on 29 November 2018 but that was not on the file. Further enquiries revealed that the facsimile had not in fact been sent. It initially appeared that it had been sent because there was an endorsement on it to that effect but that proved to be a mistake. The Appellant's representatives said that they wanted to get an OASYs Report, an independent social worker's report and a medical report. Additionally one of the witnesses could not give evidence because she had to undergo surgery at the end of November.

8. Understandably, Judge Andrew decided that the appeal ought to be adjourned and adjourned the hearing until 4 February 2019. It was her intention for there to be sufficient time for all reports to be obtained and for the witness to have recovered from surgery. Judge Andrew did not give further directions.

9. Mr Adophy attended the hearing on 4 February 2019 and gave Judge Andrew a letter which she was told had been sent to the Tribunal by facsimile but again it was not on the file. The letter is dated 30 January 2019 and was sent by facsimile to Birmingham IAC and received on Friday 1 February 2019. It referred to the hearing on Monday 4 February 2019. By that letter the Appellant asked for the hearing on 4 February 2019 to be treated as a Case Management Review Hearing.

10. The letter was not ignored by Birmingham IAC but by the time it received the letter the file was in Coventry to be ready for the hearing. I have seen a file note from Mr R Metcalf the Tribunal Case Worker in Birmingham saying:

> "1 The appellant requests that the substantive hearing listed on 4/2/2019 be converted to an oral Case Management Review
> 2 The request is refused. The conversion would necessitate the adjournment of the substantive hearing and the appellant has not provided 1 clear days' notice as per IAC Practice Directions r.9.q. The appellant must make any applications he thinks fit to the Tribunal at the hearing. In any event the letter was received too late at Birmingham IAC too late to be place on the file because it had already been transferred to the Coventry Magistrates' Court where the case was due to be heard."

11. Irritatingly, and extraordinarily, there is nothing in the Tribunal records to show that Mr Metcalf's letter was ever "actioned". Mr Adophy says that he never received a reply based on Mr Metcalf's instructions and I am satisfied that this is because it was never sent.

12. Two paragraphs of Judge Andrew's decision after the February 2019 hearing are particularly important and I set them out below:

> "10 Once again it appeared from the letter [*that is the letter from the representatives given to Judge Andrew at the hearing on 4 February*] that nothing had been done. I was told by the representative the Appellant was waiting for a report from an NHS psychiatrist. He had some doubts that the Appellant had capacity. I asked why this was the case and was told that he expected the NHS to provide a report for the Tribunal rather than instructing a psychiatrist privately. I explained to the representative that it was not for the NHS to do so. In any event the representative had handed to me a copy of a letter from BMH Central and East Assessment and Recovery Team dated 24 December 2018 from which it was apparent that other than medication there was no ongoing input from the team. There was no suggestion in this letter that the Appellant was lacking capacity.
>
> 11. I was also handed a copy of a letter from Eastville Health Centre asking the Appellant to attend for a fasting blood test and ECG. The Appellant's representative told me that this had been requested because of the letter from the Assessment and Recovery Team. It is apparent from this letter that no such request had been made. I used my judicial knowledge to know that a fasting blood test will be carried out to check blood glucose measures and/or cholesterol levels and that an ECG is a routine test carried out frequently by a practice nurse."

13. Neither was there anything before the Judge to show that any approach had been made to the Appellant's probation officer. No witnesses had been told to attend.

14. There are two paragraphs in the letter that are particularly interesting. The Appellant's representatives said:

> We note that whilst in HMP Huntercomb, psychosis was a conclusion reached by the examining GP. At the session of the 13th December 2018, in addition to confirming that he hears voices asking him to kill himself, he states that he was sexually assaulted by a Police Office whilst in custody.
>
> It is our contention that a full investigation of his mental health is required to determine his capacity in relation to the appeal. As this affects that jurisdiction of the tribunal, we are of the opinion that a clear statement of his ability to appreciate the proceeding and the

reason for the proceedings, needs to be obtained. From his statement of sexual abuse whilst in custody, his appreciation of reality is minimal at best. His psychosis, unfortunately, appears to be progressive."

15. Although this might be thought to be evidence that raised a concern about the Appellant the concern was apparent on 13 December 2018. There was nothing before the Judge in February 2019 to indicate that any relevant report and been commissioned. Indeed it was plain that it had not and the representatives somehow hoped that the National Health Service would provide something. It is trite law that ill health, including mental health, is rarely a reason to allow an appeal on human rights grounds unless it is of the most severe kind and this was not suggested in the sketchy report of the general medical practitioner's observations.

16. Judge Andrew decided that there had been more than enough opportunity to prepare for the hearing. She reminded herself, correctly, that hearings had to be fair to both parties, not just the Appellant, and was satisfied that nothing was done to comply with directions.

17. Judge Andrew decided that the hearing would continue but offered to put the case back in the list if Mr Adophy would find that helpful. He took instructions and said that he had not been able to arrange for any witness to attend.

18. Judge Andrew then decided to determine the appeal on the evidence before her and with regard to any submissions that the representative wished to make.

19. The judge reminded herself of paragraphs 398, 399 and 399A of HC 395 and, arguably more importantly, of part 5A of the Nationality, Immigration and Asylum Act 2002. She particularly reminded herself that the deportation of foreign criminals is in the public interest unless one of the exceptions created by statute applies.

20. The Judge found that the Appellant first arrived in the United Kingdom in June 2000 as a visitor. His leave was extended as a student and he applied for further leave on the basis of his marriage but the application was refused on 7 August 2003. On 11 October 2003 he applied for asylum. The application was unsuccessful and the appeal was dismissed in March 2004 and he was removed in May 2004.

21. In June 2004 he applied for leave to enter as a husband of a person present and settled in the United Kingdom. The application was refused but an appeal was successful. He was given leave to enter as a spouse and eventually in April 2007 he was given indefinite leave to remain.

22. The Judge referred to the appellant's "long history of offending". He started off at the lower end of the scale. He was convicted at the Mendip Magistrates' Court of wilfully obstructing free passage along a highway and of using disorderly behaviour or threatening and insulting words likely to cause harassment and was subject to a conditional discharge. That order was imposed on 3 December 2010. It seems that he breached that order because on 23 September 2011 he was convicted at the Bristol Magistrates' Court of possessing a controlled drug of class B, in this case cannabis and he was fined. In May 2012 he was convicted at the Crown Court sitting at Bristol of possessing a controlled drug of class B, namely cannabis and he

was fined. He was also convicted of failing to surrender to custody at the appointed time. On 28 June 2012 at the Bristol Magistrates' Court he was found to be in possession of a controlled drug of class B and fined. On 11 September 2012 at the Bristol Magistrates' Court he was fined for possessing a controlled drug and on 6 November 2012 he was made the subject of a community order, a curfew requirement and electronic tagging.

23. On 20 September 2013 at the Crown Court sitting at Bristol he was convicted of possessing a controlled drug of class B, namely cannabis or cannabis resin, and possessing a knife or blade in a public place. He was given a two week prison sentence, suspended for twelve months with a requirement to carry out unpaid work and ancillary orders.

24. On 1 February 2017 he was convicted at the Bristol Magistrates' Court of possessing a controlled drug of class B, namely cannabis resin and conditionally discharged. On 13 July 2017 at the Crown Court sitting at Bristol he was sentenced to concurrent terms amounting to eighteen months' imprisonment for drugs related offences and possessing a knife. The eighteen months' sentence was sufficient to make him a foreign criminal for the purpose of Part 5A and so his deportation in the public interest unless the exceptions applied.

25. There is information from the Central Assessment and Recovery Team indicating he continued to use cannabis.

26. It appeared that the Appellant lived with his sister. He was separated from his wife. He had two children with his wife and they lived with their mother. There was no evidence about the contact the Appellant may or may not have had with them.

27. One of the children, R, is dyslexic. The other child, K appeared to be doing well at school. In June 2019 R was 10 years old and K was 14 years old.

28. The Judge confirmed there was no claim for asylum. She was concerned only with the human rights claim.

29. Part 5A creates statutory exceptions to the normal requirement that the deportation of foreign criminals is in the public interest.

30. Exception 1 applies to a person who has been lawfully resident in the United Kingdom for most of his life. The Appellant has not been lawfully resident in the United Kingdom for most of his life. It does not apply.

31. Exception 2 applies where there is a genuine and subsisting relationship with a qualifying partner or qualifying child and the effects of deportation on the partner or child would be unduly harsh. The Judge decided that the Appellant did not have a partner. The Appellant is estranged from his wife. The Judge further decided that there was no subsisting parental relationship. He did not live with the children and there was no evidence of any responsibility for decision making. The Judge opined that it might be better for the children not to have too close a relationship with their father who was a drug dependent cannabis user. The Judge was satisfied that it was in the children's best interests to remain in the United Kingdom with their mother. Occasional contact could be continued with the

Appellant in Jamaica just as it could with the Appellant in the United Kingdom. There was no question of separation being "unduly harsh" even if the parental relationship was established.

32. The Judge also looked for very compelling circumstances other than those involving a partner or children and found none. Rather the Appellant had been convicted of the offences arising from possessing drugs and later of possessing drugs with intent to supply. Although the offence leading to that conviction was a less serious example of that kind of offending it is nevertheless a serious offence that troubles the public. The Judge found that the Appellant's offending was "escalating" and found nothing to indicate a change of heart or change of life. She dismissed the appeal.

33. The appeal came before the Upper Tribunal on 10 June 2019. On that occasion I was sitting with Upper Tribunal Judge O'Callaghan. The case was not ready. Mr Adophy attended (again) to assist as best he could.

34. We directed that the Appellant's representatives write to the Tribunal confirming that they were on the record and then, no later than 22 July 2019, that the Appellant serve on the Tribunal and on the Respondent a fresh paginated bundle of all the written evidence on which he seeks to rely including, if appropriate, signed witness statements drawn to stand as evidence-in-chief without the need for further questions, a report from a psychiatrist concerning the Appellant's capacity and proof that the solicitor's letter dated 30 January 2019 to HMCTS IAC Birmingham was sent by e-mail on 31 January 2019 as alleged.

35. We directed the adjourned appeal in the Upper Tribunal be heard on or after 12 August 2019 and it was in fact heard on 12 August. The Appellant's solicitors had complied with directions and sent a bundle by facsimile. Of particular importance is a printout of an e-mail sent by solicitors (not Archbold Solicitors) to the IAC Birmingham on 31 January 2019 and referring to a letter of 30 January 2019 saying that the Appellant is registered with Bristol Mental Health as indicated by Judge Andrews and also, again as indicated by Judge Andrews, saying that they were yet to hear from the Ministry of Justice Data and Compliance Unit.

36. There was also material that post-dated the hearing before Judge Andrew.

37. My first task is to decide if there was anything unlawful in the decision made by Judge Andrew. The grounds of appeal to the Upper Tribunal are signed by Mr Adophy. The grounds set out some of the Appellant's history and looked at the Rules relating to adjournments. The grounds maintain that it is not the Appellant's fault that there was an "administrative lapses" (Ground 5(v)).

38. I have reflected on this. I must establish first why the hearing before Judge Andrew on 4 February 2019 was not ready. The problem was *not* that the "last minute" request for the hearing to be recategorized as Case Management Review was not handled satisfactorily by the First-tier Tribunal administration. The problem was that the Appellant had not prepared the necessary evidence and that is why the late application was made.

39. I realise that funding is often a problem (although not one to which the judges can give much weight) and that particular care is needed in cases involving people who are mentally ill because an attitude that might seem to be infuriatingly lackadaisical could be a symptom of their illness. Some kind of explanation was offered for an independent social worker's report not being available and an OASYSs or probation officer's report is more likely to be helpful in addressing concerns that an appellant is likely to re-offend than it is to support a reason to allow a "deportation appeal" so it unlikely to be of great importance. However medical evidence is crucial if a case to be advanced on medical grounds and nothing had had been done to obtain such a report. Further there was no statements supporting any claim about the Appellant's involvement in the lives of his children. For example teachers are often able to confirm that both parents are known to the school and attend appropriate events such as school productions or parents' evenings and that both parents sometimes meet the children from school. It seems me that there is every reason for teachers to give that kind of evidence when the facts permit it. Nothing like that had been done. At the very least signed witness statements could have been provided.

40. The simple fact of the matter is the case was not prepared properly by the time Judge Andrew came to hear it in February 2019.

41. Mr Adophy did attend on 4 February as he was required to do. He should have attended expecting to present his case.

42. Judge Andrew did not insist unthinkingly on the case going ahead. Paragraph 14 of the Decision and Reasons is important. The Judge said:

> "I took the view that the Appellant and his representatives had more than enough time in which to prepare for the hearing. The purpose of the hearing is to be fair to both sides – not just the Appellant. It was apparent that nothing had been done to comply with any of the Directions that had been made in the matter and that there seemed to be a complete disinterest in doing anything at all until a very short period prior to the hearing being listed when applications for adjournments were made."

43. Before reaching this conclusion Judge Andrew had reflected on the limited evidence concerning the steps that had been take in the appeal.

44. Judge Andrews considered the very skimpy medical evidence that was available and is criticised in the grounds for saying that she took "judicial notice" that a fasting blood test was used to check blood sugar and/or cholesterol levels and an ECG test was frequently carried out by a practice nurse. I do not accept that these findings are based on sufficiently notorious and irrefutable evidence to be a proper example of judicial notice. However the rules of evidence do not apply in the Tribunal. Much more importantly there was nothing to indicate that any detailed report had been requested.

45. The Appellant's mental health is important for two reasons. He might not be fit to give instructions and he might be so poorly that he could not establish himself in Jamaica. No doubt Judge Andrew had these things in mind when she adjourned the hearing in December.

46. Judge Andrew was clearly entitled to conclude that there had been ample opportunity at least to establish an outline case. That opportunity had not been taken and there was no good reason to think that the position would be any better of more time was given.

47. Contrary to the contention in the grounds, there is nothing "unfair" about Judge Andrew's decision to adjourn the hearing. She was faced with someone who had not improved the preparation of case since it was last adjourned and had not even taken witness statements which could have assisted the Appellant.

48. I see no merit in the materiality of the criticism of the Tribunal for not passing on the application to re-designate to a Judge the hearing on 4 February. The application arrived too late to be considered properly as, for good reason, the file had left the building and the Appellant had no reason to equate indecision with approval. It is an annoying administrative error. It is not a material error of law.

49. The grounds do not criticise the decision that was made.

50. I am not persuaded there is any error by Judge Andrew. Her decision was entirely sensible on the material before her. She balanced carefully the public interest in deportation of a foreign criminal with the statutory exceptions.

51. There was no evidence that this Appellant is not competent or that his mental health has deteriorated to anywhere near the level where he would have established a human right to remain.

52. Having decided that there is no merit in the grounds I risk criticism by going further but this an appeal touching on the welfare of two children. I have considered the material even though it was not before the Upper Tribunal.

53. There is now a medical report now dated 3 July 2019 that refers to his claim the Appellant experienced voices telling him to self-harm and that he is now taking Mirtazapine and Olanzapine which are commonly prescribed for depression and bipolar disorders.

54. There are statements by members of the Appellant's family. There is a statement from one Nicola Higgins who is the mother of the Appellant's sons. She confirms that the relationship between her and the Appellant had broken down but they remained close for the sake of the children. She said she was working holding down two jobs. She wrote to the Appellant in appreciative terms describing him as "a godsend". She worked in a hospice providing palliative care and said that the Appellant takes his sons into town to buy their school uniform, clothes and toys. She said the Appellant knows nothing of life in Jamaica, he has no family there. She denied the Appellant had ever been removed to Jamaica but said he returned voluntarily at his own expense.

55. There is a letter from the children referring to their extremely close relationship with their father.

56. There is a letter from the Appellant's sister saying in effect that he has no contacts in Jamaica and that he had suffered the ironically unattractive handicap of

contracting TB when he was working as a hospital porter and that had left him with a damaged lung.

57. There is a supporting letter from a Member of Parliament but that is a perfectly appropriate prompt to give the matter proper care. The member does not write from a position of being particularly well informed about the Appellant. The writer did reflect on the undesirability of taking K out of school in a school year that is critical for his GCSE but this is not a case where there is any plan (or power) to remove the children and, at the age of 14, I am not sure that the school year is that critical.

58. There are photographs tending to show some sort of family life.

59. I have reflected on the information that I have. I have read the statements. I want the children to know that the statements have been read and considered.

60. It may be that there is a stronger family life between the Appellant and his children and the Appellant and his former partner than the First-tier Tribunal Judge appreciated. It may be that there is some contact that extends to practical care and that makes it easier for the mother to be employed and sometimes some of the administrative tasks involved in managing the children is discharged by the Appellant. He may not be the absentee father that he might have been thought to be.

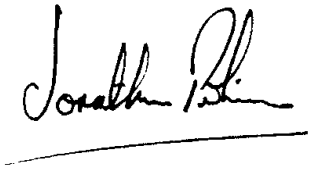
61. Without in any way wanting to suggest that the Appellant has a strong case, there are strands of evidence here that Judge Andrew would have wanted to consider and no doubt would have considered if they had been placed before her but it is not an error of law to fail to consider evidence that had not been served.

62. The Appellant is subject to deportation because he is a criminal. He is a criminal who has persistently flouted the law, working his way up to an eighteen months' sentence of imprisonment which activated the automatic deportation provisions. That is his fault and no one else's. Parliament has taken a strict view which the courts must uphold. The strict view is tempered by certain exceptions that were not shown to apply here because the necessary evidence was not available. Better evidence is available now and the Appellant can consider making fresh submission if he wishes but he must not assume that it would amount to a fresh claim in law.

63. I am sorry if the Appellant feels a sense of injustice because he has not had a hearing. In fact he has had several but was not able to take advantage of them. As the First-tier Tribunal Judge recognised, she had to be fair to both parties and cases have to be decided, rather than adjourned endlessly.

Notice of Decision

64. The First-tier Tribunal did not err in law and the appeal is dismissed.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 1 November 2019