Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00803/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype for Business via Field House	**Decision & Reasons Promulgated**
On 20th April 2021	**On: 28th April 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

DILWAR ALI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee, of Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh born on 21st July 1987. He arrived in the UK in 1992 at the age of four years with his parents, and was granted indefinite leave to remain on 20th October 1999. He went back to Bangladesh in December 1999 and remained there until

February 2002 when he returned to the UK. He has remained in the UK ever since with indefinite leave to remain. The rest of his family are British citizens.

2. The appellant was convicted of four counts of theft of high value jewellery at Snaresbrook Crown Court, and on 8th April 2016 was sentenced to 4 years imprisonment. A deportation order was made against him on 5th July 2017 and his human rights application to remain was refused on 6th December 2017. His appeal against the decision refusing his human rights claim was dismissed by First-tier Tribunal Judge Traynor in a determination promulgated on the 24th March 2020.

3. Permission to appeal was granted by Judge of the First-tier Tribunal Parkes on 10th November 2020 on the basis that it was arguable that the First-tier judge had erred in law because it was arguably procedurally unfair as the appellant had been recalled to prison when the appeal was determined and was thus unable to challenge the decision in time as the respondent had not informed the First-tier Tribunal of his new address in prison, even though she must have been aware of it.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Skype for Business, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing.

Submissions – Error of Law

5. In grounds of appeal from Mr Mervyn Cross of Duncan Lewis Solicitors for the appellant it is argued, in summary, as follows.

6. The salient facts are said to be as follows. It is found by the First-tier Tribunal that the appellant has been resident in the UK for 28 years since the age of 4 years. He is also found to have learning difficulties and impaired hearing, but the appeal was dismissed. At the end of the appellant's four year sentence on 24th April 2018 the was detained under Immigration Act powers until 25th February 2019, at which point he was released on bail by the First-tier Tribunal. When he was released the First-tier Tribunal were informed of his address in Stepney Way. A notice of hearing for the First-tier Tribunal appeal dated 12th November 2019 was sent to Duncan Lewis Solicitors on 15th July 2019, and Duncan Lewis informed the appellant at the Stepney Way address of the hearing on 2nd September 2019. However, as Duncan Lewis had no instructions for a period of more than three months, they went off the record with the First-tier Tribunal on 31st October 2019. The appeal was then heard in the absence of the appellant on 12th November 2019, and dismissed in a decision promulgated on 24th March 2020. On 8th

February 2020, and thus prior to the promulgation of the decision, the appellant was recalled to prison for breaching the conditions of his probation licence and remained in prison at the time the application for permission to appeal was made.

7. It is argued in the grounds of appeal that the First-tier Tribunal's decision was contrary to procedural fairness for the following reasons. The appellant did not receive the decision dismissing his appeal made on 24th March 2020 even though he was a serving prisoner and thus in circumstances where the Secretary of State for the Home Department would have been aware he was in custody and of the details of his new address. Those at the address at Stepney Way did not know where the appellant was so could not forward the decision to him. It is argued that the respondent had a duty to update the First-tier Tribunal with the appellant's new address, particularly as from the decision it was clear that the respondent has been made aware of the appellant's learning disability and hearing problem, and as set out in the respondent's detention and case progression review notes obtained by the appellant's solicitors via a subject access request, he had been found to be a level 2 adult at risk due to his dyslexia and hearing impairment.

8. It is also argued in the grounds that as a result of this procedural unfairness the appellant was unfairly denied the opportunity to challenge the decision which erred in law as it wrongly applied the test of "unduly harsh" in light of the decisions in AA (Nigeria) v SSHD [2020] EWCA Civ 1296 and HA (Iraq) v SSHD [2020] EWCA.

9. Mr Lee accepted before me that as Judge Parkes had extended time to appeal when granting permission there was in fact no material procedural unfairness, and further that the concept of unduly harsh correctly played no part in the First-tier Tribunal's decision-making and so that the grounds as drafted did not disclose any errors of law on the part of the First-tier Tribunal.

10. Mr Lee argued however that I should permit an oral amendment to the grounds so that he could argue that the First-tier Tribunal had erred in law by not firstly making clear findings as to whether the appellant met the three elements of the private life exception to deportation at s.117C(4) of the Nationality, Immigration and Asylum Act 2002, and then proceeding to consider whether there were any very compelling circumstances over and above that exception so as to conclude whether the appellant could meet s.117C(6) of the Nationality, Immigration and Asylum Act 2002. Mr Lee accepted he had no instructions to explain why the grounds were being changed orally at this very late stage, but argued that the point was an obvious one and that the fact that the appellant had lived in the UK since he was a very young child, albeit with a two year absence, was a potential element which might lead to it succeeding. He argued that the guidance of the Court of Appeal in Latayan v SSHD [2020] EWCA Civ 191 left the door ajar for me to permit such an amendment of the grounds.

11. Mr Whitwell argued that I should not permit the grounds to be amended at this late stage. He argued that this was contrary to the guidance of the Court of Appeal in Talpada v SSHD [2018] EWCA Civ 841 which encouraged a strict approach to restricting amendments to grounds in public law cases, and that in this instance the approach was simply an attempt to reargue the facts of the case as the appellant did not like the outcome of the appeal. Mr Whitwell also argued that there was no Robinson obvious error in the decision of the First-tier Tribunal. He said he would not be in a position to address this new ground as his preparation had been on the basis of procedural fairness, and so if it were permitted to amend the grounds he would be forced to apply for an adjournment of the hearing.

12. I informed the parties that I refused the application to amend the grounds of appeal by the appellant, and that as it was conceded that the original grounds did not disclose any error of law on the part of the First-tier Tribunal that the decision, dismissing the appellant's human rights appeal, was upheld. I did not give an oral judgment however, and now set out my reasoning below.

Conclusions – Error of Law

13. It is accepted by the appellant that the First-tier Tribunal acted lawfully in proceeding with the appeal in the absence of the appellant given the service of the hearing notice on his representative and his representative having informed him at his residential address, applying Rules 2 & 28 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 as set out at paragraph 6 of the decision.

14. As conceded by Mr Lee the issue of the appellant not initially receiving the decision of the First-tier Tribunal dismissing the appeal due to his not having informed the First-tier Tribunal of his current address when he was recalled to prison, and so having to appeal out of time, is of no material relevance as time was extended by the First-tier Tribunal to make the application to appeal and so the appellant has not been disadvantaged, or suffered any procedural unfairness, by receiving the decision late.

15. Mr Lee also accepted that the substantive ground of appeal at paragraph 16, that the wrong exposition of the "unduly harsh" test had been applied, could not disclose an error of law as this test relates to the family life Exception 2, as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002, to deportation which has no application on the facts of the appellant's case and was not applied by the First-tier Tribunal.

16. Mr Lee wished however to amend the grounds orally before me to an entirely different challenge as outlined at paragraph 10 above, relating to the structuring of the decision-making, which he argued should firstly

have addressed Exception 1, as set out at s.117C(4) of the Nationality, Immigration and Asylum Act 2002, and its three component parts and then looked for matters over and above that exception. Mr Lee argued that the First-tier Tribunal had erred in law in failing to make the decision in this way.

17. I refused to permit this challenge to be argued. Mr Lee was not able to explain why this challenge was not originally put in the grounds or why a timely application had not been made to amend the grounds in writing.

18. I note the guidance of the Court of Appeal at paragraph 32 in Latayan which cites Talpada at paragraph 69. I do not find that the new ground encapsulates a Robinson obvious error on the part of the First-tier Tribunal. The First-tier Tribunal sets out the correct statutory framework at s.117C of the 2002 Act at paragraphs 28 to 30 of the decision, and cites case law relevant to the consideration of the "very compelling circumstances" test at paragraphs 31 & 32 of the decision. It is clear that the First-tier Tribunal had in mind the known facts of the case when coming to its conclusion. Consideration is given to the nature of the appellant's criminality and the fact that he had been present in the UK for most of his life. It is noted by the Judge of the First-tier Tribunal at paragraph 36 of his decision that there was "no evidence to inform me as to the Appellant's current or physical status and what he is now doing."; and at paragraph 40 of his decision that "little is known" about the appellant beyond what is set out about his issues at school and special needs at paragraph 42, and a contention that he assisted his father considered at paragraph 43. I conclude that there is no Robinson obvious error by the First-tier Tribunal: the decision was made by setting out the correct legal test and considering the very limited facts before the Tribunal, which did not have the benefit of the appellant's attendance and oral evidence, in the context of that test.

19. In these circumstances I conclude that a robust position should be taken to this application to radically amend the grounds of appeal to one which is entirely unrelated to those on which permission was granted, particularly as the application is made orally on the day of the hearing without any reasoning as to why it is done at this late stage in the context of the appellant being represented throughout this application to appeal by experienced immigration solicitors. I therefore refuse the application to amend the grounds.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. I refuse the application to amend the grounds of appeal.

3. I uphold the decision of the First-tier Tribunal dismissing the appeal on human rights grounds.

Signed: Fiona Lindsley Date: 20th April 2021
Upper Tribunal Judge Lindsley