Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01004/2013

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice
On 10 March 2014

Determination Promulgated
On 26 March 2014

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

LLOYD FITZGERALD WITHALL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Justine Fisher, Counsel instructed by Messrs Duncan Lewis and Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Jamaica, born on 17 November 1963, against the decision of a panel of the First-tier Tribunal heard at Hatton Cross on 18

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September, 27 November and 11 December 2013, when, in a determination promulgated on 20 December 2013, the Appellant's appeal against the decision of the Respondent dated 15 May 2013 refusing to grant to him asylum and to make a deportation order by virtue of Section 32(5) of the UK Borders Act 2007, was dismissed on asylum, humanitarian protection and human rights (Articles 3 and 8 of the ECHR) grounds.

The Proceedings

2. The Appellant made a successful application for permission to appeal that decision and in granting such permission on 15 January 2014 First-tier Tribunal Judge Pirotta had inter alia, this to say:

> "The grounds asserted that the Tribunal committed an error of law (in that) they refused an application for an adjournment when the Appellant, who was in custody, had failed to attend because he was unwell. The Tribunal's refusal of an adjournment was an unfair and inappropriate decision as the Appellant had not had the opportunity to address the issues of credibility and family life. The hearing had not been seen to be fair as the Appellant's ability to deal with significant issues was compromised.
>
> The hearing of the appeal had been adjourned part heard on 18 September 2013, there being inadequate time for the hearing, the Appellant having become unwell at the first hearing on July 2013, as he had not been given his medication for a constellation of ailments. At the resumed hearing on 27 November 2013 the Appellant again became unwell and experienced an epileptic fit, he was taken away in an ambulance. The Appellant, who was in custody, was not brought to court for the resumed hearing on 11 December 2013, he was unwell but there was no medical evidence of that condition at that time. The Tribunal was told he was unwilling to attend but it was advanced by his representatives that he was unwell. The Tribunal refused to adjourn to obtain a further medical report concerning his condition or ability to participate in proceedings.
>
> The Appellant had sent the Tribunal evidence and medical notes on 18 December 2013 to show that he had attended the medical centre on 11 December 2013, having had seizures that day.
>
> I conclude that it is arguable that the Appellant had not had a fair and comprehensive hearing as the Tribunal knew of his protracted ill health and had experienced at first hand his inability to participate because of health issues, on two occasions of hearings. The Tribunal can only have acted on the material available to them at the time. However, since Justice must not only be done but must be openly and manifestly been seen to be done, the failure to accede to the request for an adjournment in these circumstances had given rise to the appearance of unfairness, because the Appellant could not be a witness in his own appeal.
> I therefore agree that there is an arguable case for challenging the decision as the Determination may contain errors of law."

3. Thus the appeal came before me on 10 March 2014, when my first task was to determine whether the determination of the First-tier Tribunal disclosed an error of

errors on a point of law such as may have materially affected the outcome of the appeal.

4. Prior to the hearing, the Tribunal received from the Respondent a Rule 24 response dated 18 February 2014 opposing the Appellant's appeal and submitting that the First-tier Tribunal directed themselves appropriately. The response went on to state as follows:

> "The Judge was advised that the Appellant did not intend to attend, paragraph 11. There was no medical evidence to support the contention that the Appellant was so unwell as to be unable to attend court.
>
> There had been two previous adjournments as a result of the Appellant's medical conditions and there was no adequate evidence as to when (if ever) the Appellant's medical conditions would not lead to him deciding that he did not wish to attend as at the current hearing.
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> Under the particular circumstances of the case it was open to the panel to conclude that there was inadequate evidence to justify an adjournment and the evidence on which the Appellant is now reliant cannot be admitted to establish an error of law and does not in any event establish that the panel materially erred in law in proceeding with the hearing.
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> The panel found there were manifest inconsistencies in the Appellant's account as outlined in the findings. It was open to them to dismiss the appeal taking account of all the circumstances before them.
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> The other grounds are a sustained disagreement with well reasoned findings. The Respondent would seek to point out that the reliance on <u>Maslov</u> at paragraph 29(ii) is misconceived as the very weighty reasons referred to are not applicable to adult entrants but are specifically related to settled persons who entered as children and spent the whole or majority of their childhood in the host country."

5. The Tribunal also received a bundle of documents from the Appellant's solicitors essentially in support of the submission that the panel's failure to adjourn the hearing for the Appellant to attend, was unfair and precluded the Appellant from having a fair hearing, that he was unable to give evidence and to address the credibility issues raised against him.

6. In that regard, it was pointed out that the Tribunal made adverse findings of fact that included a reference to the Appellant's lack of attendance. Indeed reference was made to the following observations of the panel within their findings:

> "33(5) The Appellant does not refer to any other physical attacks upon him in either his witness statement or AIR but in the medical report from Norfolk and Norwich University Hospitals dated 24th May 2012 he refers to having been attacked by a gang in 1996. **This discrepancy has not been explained**.

34. The Appellant's credibility is further undermined by the fact that we consider **he failed to attend the hearing without reasonable excuse**." [Emphasis added].

7. It was pointed out that the Appellant suffered from a number of medical conditions and that the First-tier Tribunal had seen first hand the Appellant having an epileptic fit in court at the hearing before them on 27 November 2013.

8. It would be as well that I set out paragraphs 16 to 21 of the Appellant's grounds of challenge in that regard in which the following was stated:

"16. The Appellant suffers from a number of medial conditions and the FTT saw first hand the Appellant having an epileptic fit in court on 27 November. He has to take a lot of medication for epilepsy, asthma and depression as well as urinary/prostrate issues. In fact the failure of security to give the Appellant his medication led to an adjournment in July.

17. The Crown Court when sentencing the Appellant, noted the medical report by Dr Chou and that the Appellant's illnesses were debilitating within the prison context [para 25].

18. There was also a medical report by Dr Sahota which was referred to [25 and 37]. The FTT in considering Dr Sahota's evidence state that the report does not deal with the Appellant's ability to give evidence [37] which is true, but an updated email and concerns for the Appellant's deteriorating health raised issues that should have been addressed in an updated report. This was one of the issues for the adjournment request.

19. The findings of fact are compromised by the findings the FTT has made and the unfairness in the proceedings. It is simply impossible to say what the FTT could or would have found from the current position where the Appellant was absent and unable to give evidence.

20. It is clear from the evidence before the FTT (that) this Appellant suffers from a number of serious medical conditions. It was unreasonable not to grant an adjournment request, particularly as the hearing on 27 November had to be adjourned after the Appellant collapsed and had to be taken to hospital.

21. These findings cannot be saved as they are tainted by the fundamental unfairness. It would have been impossible for any Tribunal to reach a fair and balanced decision in relation to proportionality on the FTT's assessment of the evidence. These findings are inseparable to the unfairness in the hearing."

9. Further and before the hearing before me, the Tribunal received the Respondent's further submissions. In that regard, reliance was placed on her earlier Rule 24 response arguing inter alia, that the hearing had been adjourned on two previous occasions at short notice and that in the absence of any medical evidence, the panel were correct to go ahead with the hearing. Further the Appellant had been unwell

on three previous occasions and that it was "more likely that the Appellant would fail to appear again at any future hearing".

10. The Tribunal also received a further letter from the Appellant's solicitors dated 7 March 2014 to which was attached a psychiatric report on the Appellant by Dr Tahira George dated 4 March 2014 and thus postdating the hearing before the First-tier Tribunal panel.

The Law

11. Rule 21 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 provides as follows:

> "21(1) Where a party applies for an adjournment of a hearing of an appeal, he must –
>
> (a) If practicable, notify all other parties of the application;
>
> (b) show good reason why an adjournment is necessary; and
>
> (c) produce evidence of any fact or matter relied upon in support of the application.
>
> (2) The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined.
>
> (3) The Tribunal must not, in particular, adjourn a hearing on the application of a party in order to allow the party more time to produce evidence, unless satisfied that –
>
> (a) the evidence relates to a matter in dispute in the appeal;
>
> (b) it would be unjust to determine the appeal without permitting the party a further opportunity to produce the evidence; and
>
> (c) where the parties fail to comply with directions for the production of the evidence, he has provided a satisfactory explanation for that failure."

12. In the course of the hearing before me, I referred the parties to a number of case law guidance decisions that included the decision of the Court of Appeal in SH (Afghanistan) [2011] EWCA Civ 1284. This of course was an important decision that pre-dated the First-tier Tribunal panel's determination. It was not however a decision to which the panel referred within their determination in explaining their reasons for refusing the Appellant's adjournment request at the hearing before them on 11 December 2013. In SH, consideration was given to the proper approach to be taken by a Judge when considering a request for an adjournment. Moses LJ who gave a leading judgment was clear that the question for the Judge was:

> "Whether it was unfair to refuse the Appellant the opportunity to obtain an independent assessment of his age; the question is not whether it was reasonably open to the Immigration Judge to take the view that no such opportunity should be afforded to the Appellant. Where an Appellant seeks to be allowed to establish by contrary evidence, that a case against him is wrong, the question will always be, what stage the proceedings had reached, **what does fairness demand**?" [Emphasis added].

13. His Lordship went on to conclude, that it was plain from the reading of the Judge's decision as a whole that this was not the test applied and that his failure to apply it was "a significant error". His Lordship continued:

> "The next question which the Judge resolved, namely whether the report which was being sought if it had been obtained would have made any difference... the Judge, on that issue, concluded that even if that report had been obtained 'it (was) reasonably likely' that (the Immigration Judge) would have reached the same decision. This was not the correct test."

14. His Lordship was clear, that when considering whether a Judge ought to grant an adjournment, the test was <u>not</u> one of irrationality, or whether the Judge's decision was properly open to him or was <u>Wednesbury</u> unreasonable and perverse, "**the test and sole test was whether it was unfair**" [Emphasis added].

15. In <u>RJ</u> (Jamaica) [2008] EWCA Civ 93, Sir Paul Kennedy who gave the leading judgment, noted not only the provisions of Rule 21 of the 2005 Procedure Rules but also Rule 4 that dealt with the overriding objective and Rule 19 that read as follows:

> "The Tribunal may hear an appeal in the absence of a party or his representative, if satisfied that the party or his representative –
>
> (a) has been given notice of the date, time and place of the hearing, and
>
> (b) there is no good reason for such absence."

16. His Lordship noted that amongst the grounds of challenge was that even if the Judge's decision not to adjourn seemed right at the time but in circumstances where postdecision evidence demonstrated that the Appellant should not be held accountable for his failure for his absence, that the court should grant the Appellant relief in the form of an order for a fresh hearing. In that regard his Lordship went on to consider that with the benefit of the additional information now available, the court should now intervene "to in effect override the Judge's decision and send this matter back for reconsideration".

17. It was held that had the Immigration Judge who had refused the adjournment in that case, been aware of the true circumstances relating to the Appellant's non-attendance that:

> "25. ...It seems to me at least possible and indeed probable that the Judge would have granted an adjournment. Certainly he would have been in possession of information which he did not have, and relevant information, and in those circumstances I find it impossible to say that this Appellant did not suffer and was not the victim of unfairness as a result of the intervention of AR on 16 May in the way that I have described.
>
> 26. I reach that conclusion with some hesitation, because I recognise the force of Mr Sheldon's third submission that in this court we should be slow to interfere with what he describes as case management decisions of the Tribunal. I endorse that submission... but so far as the present case is concerned, if one accepts, as I for my part do, that on 16 May this Appellant was told not to go to the Tribunal on the following day, and if one accepts that as a result he was unable to explain to the Judge why his case had not been prepared for proper deployment in accordance with the directions originally given by the Tribunal itself then, as it seems to me, it is impossible to escape the conclusion that he has suffered an injustice and the only way in which this court can put it right is to order that the decision of the Immigration Judge be set aside, that is to say, his final determination, so that the way is clear for the matter to be dealt with by the Tribunal on a future occasion. I would accordingly so order."

The Present Case

18. With that guidance in mind, I turn to the facts of the present case and not least the track of the appeal hearings concerning this Appellant before the First-tier Tribunal.

19. In that regard, the first hearing on 8 July 2013 was adjourned for lack of court time. That was of course not the fault of the Appellant who was both present and ready to give evidence in his appeal. However, by 3:00pm, (the case not having yet been reached) he became unwell having not been given his medication.

20. Despite the fact that it was known to the Tribunal that the Appellant was detained and that the previous hearing had not proceeded for lack of time, I find it extraordinary that when his case was re-listed for 18 September 2013, it again appeared on the afternoon hearing list and in consequence did not start until 2:00pm, where, because two witnesses who had attended to give evidence on the Appellant's behalf had other commitments, it was decided that their evidence should be heard first.

21. In the event, and by the time their evidence was concluded, it was found to be too late to proceed to hear the Appellant's evidence and the hearing was adjourned part heard. Again this was a hearing that the Appellant attended ready to give evidence on his behalf and in the event, was adjourned through no fault of his own.

22. The third hearing took place some two months later on 27 November 2013. The Appellant was again in attendance but upon arrival felt unwell and indeed before the Tribunal panel suffered an epileptic fit such that he had to be taken away in an

ambulance. The fact that such a hearing had to be adjourned in consequence cannot be blamed upon the Appellant in those circumstances.

23. It follows that by the time of the fourth hearing before the panel on 11 December 2013 they were aware, and/or should have reminded themselves, that the Appellant had attended all three previous hearings, each of which had been adjourned for reasons that were not the Appellant's fault. However, at the outset of the hearing on 11 December 2013 the panel were given to understand that the Appellant had not attended the hearing because it was said he felt unwell. In that regard and at paragraph 11 of their determination, the panel reminded themselves that they had first heard evidence in the appeal from the Appellant's witnesses on 18 September 2013 and that the hearing was adjourned due to lack of time and that at the resumed hearing on 27 November 2013 it was necessary to adjourn the hearing before receiving further evidence "because the Appellant had an epileptic fit". The panel continued:

> "The case was set for resumption on 11 December 2013 but we were advised that the Appellant who was in detention, refused to attend the hearing. There was no documentary evidence from any medical person to state that the Appellant was unfit to attend the hearing and give evidence. Ms Fisher stated that she had heard the Appellant was not well and for that reason had refused to attend. She said that credibility was an issue in this case and therefore it was important for the Appellant to give evidence. In the circumstances she applied for an adjournment. She said that if an adjournment was granted the instructing solicitors would seek an addendum to the report of Dr Sahota dated 10 September 2013, to ascertain whether the Appellant would be fit to give evidence in Court. Ms Afzal pointed out there was no evidence to show the Appellant's current inability to attend the hearing due to illness. As to a further addendum to Dr Sahota's report, she pointed out that there was no timeframe regarding the provision of this report. We concluded there was nothing to support the Appellant's assertion he was not fit to attend the hearing and accordingly we decided to proceed with the hearing under Rule 19(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (as amended)."

24. The First-tier Tribunal thus proceeded to hear and conclude the case in the Appellant's absence.

25. On 18 December 2013 the First-tier Tribunal received an email to which was attached medical evidence which confirmed that on 11 December 2013, the day of the hearing, the Appellant had attended the prison medical centre and had suffered several seizures during the course of that day.

26. I note that the panel's determination was subsequently promulgated on 20 December 2013 in relation to which no mention is made of this further evidence. In fairness to the Tribunal however it might have been the case that the email was not brought to the attention of the First-tier Judge who prepared the determination in time. I observed however that the panel at the hearing did see an email from the Appellant's doctor, Dr Sahota concerning the Appellant's deteriorating condition/health in

consequence of which he had made clear that there would be a need for him to write a further report. This did not persuade the panel to adjourn.

Assessment

27. I have concluded that in common with the finding of their Lordships in RJ (above) the refusal of the panel to refuse the Appellant's Counsel's adjournment request at the hearing on 11 December 2013 did in the event, result in the Appellant suffering an injustice. I share the view expressed by Ms Fisher who authored the grounds of challenge, that on that occasion, justice was not seen to be done.

28. In reaching that conclusion (and quite apart from the guidance in SH (above) whose guidance I have borne in mind in reaching this decision) I am further reinforced in that conclusion by the findings of their Lordships in RJ (above) where in common with the facts in that case, a few days after the last hearing, medical evidence was produced from the prison authorities that clearly and satisfactorily explained the reason why the Appellant was unable to attend that hearing due to his having suffered several epileptic seizures during the course of the day that required his attendance at the medical wing for treatment. I would, in the circumstances of the present appeal, therefore concur with the reasoning of their Lordships in RJ that it is therefore "impossible to escape the conclusion that (the Appellant) has suffered an injustice" and that the only way which this Tribunal can put it right is to set aside the decision of the First-tier Tribunal panel "so that the way is clear" for the matter to be dealt with afresh by the First-tier Tribunal on a future occasion.

29. Quite apart from that further post-hearing evidence, the evidence before the First-tier Tribunal panel at the hearing, included the fact that the three previous hearings had all been adjourned in consequence of matters that were not the Appellant's fault. Further, he had attended all three previous hearings. On two of those occasions underlying reasons for the adjournments were lack of time and that in turn was due to the fact that the appeal hearings had been listed in an afternoon list. There had thus been an administrative failure to take into account the fact that the Appellant was detained and in poor health, and that he had attended all previous hearings in circumstances where in consequence his case had not been reached.

30. There is nothing within the reasoning of the panel in refusing the adjournment request in December that demonstrates that these important matters were taken into account by them in concluding that the hearing should proceed in the Appellant's absence.

31. The panel's decision to thus refuse the adjournment request was thus unfair and it further prevented the Appellant from the opportunity to establish by way of contrary evidence that the case against him was wrong. In that regard I am also concerned to have noted that the panel in their determination and in reaching their adverse credibility findings, held against the Appellant the fact that he did not attend to give

evidence on his own behalf in circumstances in which the panel in my view wrongly considered was without a reasonable excuse.

32. I am of course aware that there were other grounds of challenge upon which permission to appeal was granted. In that regard I have reminded myself that in EK (Colombia) [2006] EWCA Civ 926, it was held that a Judge would not have to determine each point in order to decide if the determination of the First-tier Tribunal was right. That guidance was given in terms of the reconsideration process applicable to the previous jurisdiction of the Immigration and Asylum Tribunal but still has relevance today. Their Lordships held that it was not necessary at the first stage of a reconsideration to go through each of the grounds of appeal and decide whether the error of law asserted could be made out. It was enough if one of the grounds disclosed legal error. The "second" stage of the reconsideration process might then encompass all of the issues raised in the original appeal.

33. Having informed the parties of my decision and mindful of Mr Melvin's express concern as to the ability of the Appellant to attend any future listed hearing, Ms Fisher most helpfully informed me as follows:

> "I assure the court that if in the light of the medical evidence and prior to the new hearing before the First-tier Tribunal the situation is such where responsibly it cannot be said that the Appellant will be able to give oral evidence, that urgent instructions will be taken from him with a view to immediately advising the Tribunal and the Respondent that in such circumstances the Appellant's remitted appeal should proceed without him."

34. Given my finding that there had been procedural unfairness amounting to an error of law such that the determination of the First-tier Tribunal should be set aside, the parties agreed with me that there were highly compelling factors, falling within paragraph 7.2(b) of the Senior President's Practice Statement that the decision should not be re-made by the Upper Tribunal. It was clearly in the interests of justice that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

35. Indeed, in consequence of my findings, it follows that there has been no satisfactory hearing of the substance of the appeal at all. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. In such circumstances Section 12(2) of the TCE 2007 requires us to remit the case to the First-tier or re-make it ourselves. For the reasons that I have given above, I have concluded that the decision should be remitted to a First-tier Tribunal Judge or panel other than First-tier Tribunal Judge Onoufriou and Mrs Jordan (Non-Legal Member). I am advised that for this purpose the present earliest hearing date that can be obtained is 5 August 2014 at Taylor House. I am further advised that for this purpose oral evidence shall be given by the Appellant and two witnesses. There will be no need for an interpreter. There will be a need for a time estimate of three hours.

36. I cannot ignore the possibility in view of the history of this appeal and the Appellant's medical condition, that as before (and indeed due to his medical condition he was unable to attend the hearing before me, although of course oral evidence was not required from him on this occasion in any event) he may be unable to attend the remitted hearing.

37. It follows that at the remitted hearing, the First-tier Tribunal may need in such circumstances to decide whether the hearing should proceed in his absence under Rule 19(2)(d) of the 2005 Procedure Rules, for which purpose they will have to consider the circumstances as at that date.

38. I have also been given to understand that although at present the earliest hearing date that the Taylor House Hearing Centre can provide for this purpose is 5 August 2013. It may be possible, given the urgency of the matter and the fact that the Appellant has remained in immigration detention since July 2012, that the question of the hearing date might be further considered by the Principal Resident Upper Tribunal Judge at Taylor House with a view to considering whether it might be possible to obtain an earlier date than that presently arranged.

39. However, I do consider that it is in the circumstances most important that the remitted appeal be heard as a matter of priority. In accordance with Section 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007, I direct that the hearing of the remitted appeal before the First-tier Tribunal must be heard first on the list, on the basis it was, to say the least, highly unfortunate that previous hearings of this detained potential deportee before the First-tier Tribunal were so arranged that this case was not heard first on two occasions.

Decision

40. The First-tier Tribunal erred in law such that their decision should be set aside with none of their findings preserved. I remit the re-making of the appeal to the First-tier Tribunal at Taylor House to be heard before a First-tier Tribunal Judge/panel other than First-tier Tribunal Judge Onoufriou and Mrs Jordan (Non-Legal Member).

Signed Date 20 March 2014

Upper Tribunal Judge Goldstein