Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05967/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 26th January 2015	**On 25th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

KO
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Stevens, instructed by Duncan Lewis Solicitors.
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Nigeria born on 20th March 1960 and she appealed against a decision made on 4th August 2014 to remove the appellant from the United Kingdom following a refusal to grant her asylum, humanitarian protection and protection under the European Convention.

2. In a determination promulgated on 11th November 2014 Judge of the First Tier Tribunal C H Bennett refused the appellant's appeal on all grounds.

3. An application for permission asserted that the Jude had erred in law in failing to grant and adjournment, failed to consider property the evidence provided and failed to consider Article 8.

4. At the hearing before me, Mr Stevens relied on **Nwaigwe (adjournment: fairness)** [2014] UKUT 00418 (IAC) and submitted that the judge did consider the application in detail but the refusal to adjourn was unfair given the credibility findings. A specific aspect of her evidence could be clarified through medical reports including an assessment of the anal injuries. The appellant had mental health problems and her injuries were consistent with her claim that she experienced gang rape. Mr Whitwell submitted that there was still no report before the Tribunal even though the appellant was given time.

Conclusions

5. The application for permission to appeal by the appellant challenged Judge Bennett's decision on the basis that the judge had made material findings in relations to the appellant's credibility in his determination and argued that she was an unreliable witness yet the Judge failed to take proper account of the appellant's mental state including her previous psychotic episode which led to her being sectioned under the Mental Health Act (as confirmed in paragraph 34 of the appeal determination). In essence it was stated that it should have been clear to the Judge that a psychiatric report was required in order for an assessment of the appellant's ability to respond consistently to questions relating to her history of suffering inhuman treatment and torture in Nigeria. Instead of granting an adjournment the judge gave the appellant's representatives an unrealistic period of time in which to instruct such an expert to prepare a medical report (three weeks) and the judge did not mention or respond to the confirmation in the appellant's representative's further representations submitted, in accordance with the directions, confirming the impossibility of instructing medical experts with the timeframe allowed and as confirmed by emails from various medical and psychological experts which were included in the representations.

6. It was also stated that the respondent had only made the basis of the rejection of her claim known on 4th August 2014. The hearing took place on 19th September 2014.

7. The Rule 24 response from the respondent advanced that counsel representing the appellant before the First Tier Tribunal accepted an error on the part of the solicitors for failure to request a medical report prior to the hearing. The respondent submitted that the judge directed himself appropriately.

8. At paragraph 23 the judge reasoned that he was not satisfied that the appeal could not be justly determined without there being an adjournment and thus he was prohibited by the mandatory provisions of Rule 21(2) of the Tribunal Procedure Rules from adjourning the hearing. The

background as set out above and in the determination was that the appellant had experienced significant mental health difficulties since 2009 as a result of the experiences in Nigeria. Clearly the judge accepted the necessity to delay his determination for the production of further evidence in relation to medical reports and yet by way of contradiction did not consider that the appeal could not be justly determined on the day.

9. The judge stated at [22a]

> 'There has been ample time since June 2014 (*a fortiori* since March 2012) for a medical report dealing with the question of whether that was reasonably likely to have been a consequence of the (asserted) rapes. There is no clear explanation, let alone a witness statement from the individual who has been handling Mrs O's case at all times since she first consulted Duncan Lewis (or any other firm or firms she has previously consulted), to explain why (if this is the case) no steps had been taken to obtain a consultant's report or to demonstrate what, if any, but unsuccessful attempts had been made. I am well aware that Duncan Lewis is experienced and conscientious solicitors, well accustomed to dealing with immigration and asylum appeals. Whilst it is possible that whoever has had the conduct of this matter simply overlooked the need to obtain a consultant's report (and this is in effect what Miss Sirikanda invited me to conclude), I was not provided with the details necessary to reach a positive conclusion that that is what happened. I am not satisfied that it is the only realistic explanation'

10. Although the judge stated at [21] that he was not satisfied that the requirement of Rule 21(3)(c) of the Rules was fulfilled that is

> (c) where the party has failed to comply with directions for the production of the evidence **he has provided a satisfactory explanation for that failure.**

he stated at 22(e)

> 'crucially and irrespective of all the above points, I could see no reason why I should adjourn the hearing, and waste the hearing day, or why I should not simply hear the oral evidence and then delay the preparation of my determination for a comparatively short period of time to enable DL to arrange for Mrs. O to be seen by one or more appropriate medical practitioners and for their reports to be submitted. …
>
> The 3 week period which that involved was shorter than that which Miss Sirikanda required. But I had in mind, not only the ample time which there has been to obtain a report but that to obtain a report within the above timescale might involved the payment of an additional fee. But if that was the result, that would simply be the consequence of having delayed the giving of instructions and/or not having considered the need for one or more medical reports in good time. No evidence was placed before me to support the proposition, and I am not satisfied that no such reports could be obtained within the 3 weeks which I allowed'.

11. The judge gave no consideration as to whether the fault of the solicitors, bearing in mind the mental health of the appellant, should be held against

the appellant and did not take the point that the decision letter of the respondent was produced a matter of only just over 6 weeks prior to the date of the hearing.

12. As pointed out above the reasons for refusal were made the month before the hearing and the judge made no reference to the emails sent to the Tribunal demonstrating that the medical report could not be produced within the three week timescale.

13. I am not persuaded that **Nwaigwe** is *per incuriam* not least because the Tribunal Procedure Rules are to be read in the light of the overriding objective (rule 4 of the Procedure Rules) and an **overriding** objective is just that. Whether applying Rule 4 of the 2005 Rules or the previous Rule 10 the proceedings must be just.

14. The reference to Rule 21(3)(c) does not take into account the overriding objective but even if that were incorrect **Ngwaige** refers to the fundamental common law right, namely the right of every litigant to a fair hearing. I cannot see that **Nwwaige** is *per incuriam* on this point. It is self evident that the interests of justice include the differing perspectives of both appellant and respondent and time and expense refers to that of the appellant and respondent and to the expense to the public of funding the asylum appeal system.

15. **SH Afghanistan v SSHD** [2011] EWCA Civ 1284 (albeit that the court was not concerned with the Tribunal Rules) sets out a fundamental proposition with regard adjournments, and although this case referred to Fast Track cases, the proposition can be applied more generally, as follows

> 'It is fundamental that the parties should be allowed to answer adverse material by evidence as well as argument (see, e.g., In Re. D [1996] AC 593 at 603) and all the more so where the subject matter, such as a claim **for asylum, demands the highest standards of fairness** (R v Secretary of State for the Home Department ex-parte Fayed [1998] 1 WLR 763-777).'
>
> And further
>
> 'if that report had not been obtained the question for the Upper Tribunal on appeal from the First Tier Tribunal was whether it would have been pointless to wait for further independent evidence as to age. Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same'.

16. One of the distinguishing features in **SH** appeared to be not that the matter was in fast track but that in fact, as in this case, it was an asylum matter.

17. The fact that the judge delayed his decision by 3 weeks accepts that a further report would not necessarily be pointless and as conceded by Mr Whitwell, and in this particular case nowhere in the determination was there any reference to the Vulnerable Witnesses guidelines. This in itself

was an error but a further report may well have shed light on the treatment of the appellant's evidence (the first interviews were conducted) and the approach to be taken to it.

18. The Judge erred materially for the reasons identified and this goes to the heart of the credibility findings of the determination. As such I do not address the further grounds in the application for permission to appeal. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement

Signed Date 23rd February 2015

Deputy Upper Tribunal Judge Rimington