



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/11602/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30 November 2015

Decision & Reasons Promulgated
On 4 January 2016

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

TMN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Clarke, instructed by Fadiga & Co
For the Respondent: Miss S Sreeraman, Senior Home Office Presenting Officer

Anonymity

We maintain the anonymity order made by the First-tier Tribunal, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless the Upper Tribunal or a Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This prohibition applies to, amongst others, all parties and their representatives.

DECISION AND REASONS

(Delivered orally at the hearing of 30 November 2015)

Introduction

1. The appellant is a citizen of the Democratic Republic of Congo, born in December 1950. She appealed to the First-tier Tribunal against the respondent's decision dated 4 December 2014 to remove her from the United Kingdom by way of directions under Section 10 of the Immigration and Asylum Act 1999. On the same date the respondent refused the appellant's application for asylum.

Error of law

2. That appeal was heard on 27 March 2015 by First-tier Tribunal Judge Wylie and dismissed in a decision promulgated on 21 May 2015. Prior to the hearing the appellant made an application for adjournment on the papers in order to seek the opinion of The Medical Foundation, primarily to determine whether they would be prepared to provide a medical report which she could then use in support of her appeal before the Tribunal. That application was refused in strident terms on the papers but was renewed at the hearing before the FtT by Miss Clarke on the appellant's behalf.
3. The FtT refused to adjourn the hearing, ostensibly for the reasons duly set out in paragraph 13 of its decision:

"I determined that the application to adjourn should be refused. The appellant had only described rape and specific abuse in her supplementary witness statement dated 26 March, and the question of credibility was a matter for the Tribunal. The existence of scarring from injuries and cigarette burns could have been confirmed by the medical examination, but as the injuries were claimed to have been sustained sometime between around 22/23 July 2014 and the following three days, they would almost certainly have been obvious as recent injuries when the appellant arrived in the United Kingdom on 3 August 2014, and the appellant could have obtained medical evidence at that time. Although the respondent had made the decision without taking account of the claim that the appellant had been assaulted as now described, it was within the ability of the Tribunal to consider all the information and reach a decision."

4. Further relevant findings are also found in paragraphs 31, 36 and 39 of the decision, which I do not read out.
5. The appellant appeals to the Upper Tribunal with the permission of First-tier Tribunal Judge Ford, granted on 16 June 2015. Although the grounds are lengthy the appellant in effect relies on a solitary point; that the refusal to grant an adjournment has caused unfairness.
6. The starting point for our consideration and, indeed, what should have been the starting point for the First-tier Tribunal's consideration is paragraph 2 of the Tribunal

Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (Statutory Instrument 2604/2014):

- “(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
- (2) ...
- (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.”

7. Rule 4 of the Procedure Rules gives power to the FtT to adjourn or postpone a hearing. It is axiomatic that when deciding whether to adjourn or postpone a hearing the FtT should always have at the forefront of its mind the overriding objective set out above.
8. The issue of fairness has been considered in a number of recent decisions of the Upper Tribunal, including by the President in Nwaigwe (Adjournment: fairness) [2014] UKUT 00418. This case considered the previous version of the First-tier Tribunal Procedure Rules but is nevertheless still instructive on the approach that should be taken in cases such as the instant one, where considerations are being given as to whether to adjourn the hearing of an appeal. Paragraphs 7 and 8 of Nwaigwe are of some importance and remind both this Tribunal, and the First-tier Tribunal, that when considering the question of whether to adjourn a hearing, the issue of fairness (to both parties) is of prominence.
9. Turning back to the decision of the First-tier Tribunal in the instant case. Miss Sreeraman submits that although the decision does not explicitly refer to rule 2 of the 2014 Procedure Rules, or to the matters identified therein, the fact that such consideration was given by the FtT can be implied from reading the decision as a whole, and in particular paragraph 13 thereof.
10. We do not accept this to be so. As was conceded by Miss Sreeraman, the decision of First-tier Tribunal discloses no explicit reference to the terms of rule 2 of the 2014 Procedure Rules, nor does it include any appropriate self-direction. Neither in our view can such be implied from reading the decision as a whole, or any particular part thereof. The failure of the First-tier Tribunal to engage in the proper process and consideration of a matter which should have been at the very heart of its deliberations i.e. the issue of fairness is of critical importance and amounts to an error of law.
11. The only question that remains therefore is whether the aforementioned error is one capable of affecting the outcome of the appeal. We have no hesitation in answering this question in the affirmative. Although the First-tier Tribunal gave careful and detailed reasons for rejecting the truth of the appellant's account, its decision admits in paragraph 13 thereof of the possibility that the medical evidence which the appellant sought to obtain could provide confirmatory and corroborative evidence of her account. Assuming this to be so, the Tribunal would have been required to feed

this into the underlying assessment of whether the appellant had given a credible account of the reasons why she fled from her homeland. We cannot discount the possibility that had the medical evidence been before the First-tier Tribunal, it would have come to a different conclusion as to the truth of all or parts of the evidence given by the appellant.

12. Consequently, for these reasons we find that the First-tier Tribunal's decision contains an error of law capable of affecting the outcome of the appeal and we set aside such decision.

Re-Making of Decision

13. Having announced the aforementioned decision at the hearing both parties agreed that the proper course is for this matter to be remitted to the First-tier Tribunal to be considered afresh. Given the extent of the fact finding necessary to determine the appeal, we concur.

Decision

The decision of the First-tier Tribunal contains an error of law capable affecting the outcome of the appeal and we set it aside

We direct that the appeal be remitted to the First-tier Tribunal to be determined afresh by a Judge other than Judge Wylie.

Signed:



Upper Tribunal Judge O'Connor