



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/05913/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at North Shields

**Decision &
Promulgated**

Reasons

On 20 February 2018

On 06 March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**F F
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Brackaj of Iris Law Firm

For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, because this appeal turns on concerns about the appellant's health.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Herlihy issued on 12 July 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on [] 1982 and is a national of Iraq. On 7 June 2017 the Secretary of State refused the Appellant's protection claim. On 20 June 2017 the appellant tendered a notice of appeal, but did not lodge any grounds of appeal. Directions were issued on 21 June 2017 requiring the appellant to lodge grounds of appeal not later than 28 June 2017. No grounds of appeal were produced. The directions warned the appellant that in the absence of grounds of appeal her appeal may be dismissed without a hearing.

The Judge's Decision

4. On 12 July 2017 the appellant's notice of appeal and the respondent's decision were put before a duty Judge of the First-tier Tribunal. First-tier Tribunal Judge Herlihy ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 10 October 2017 Judge Pickup gave permission to appeal stating

"1. The appellant seeks permission to appeal, (in time), against a decision of the First-tier Tribunal (Judge Herlihy) who, in a decision and reasons promulgated on 12.7.17, dismissed his appeal against the Secretary of State's decision to reject his asylum claim.

2. The case is unusual. The appeal was dismissed by the First-tier Tribunal Judge without a hearing on the failure of the appellant, despite directions to do so, to submit grounds of appeal. However, it transpires that the appellant had been detained for 28 days under section 2 of the Mental Health Act at the time the appeal was lodged on her behalf by her husband. The appellant also claims that no directions had been received from the tribunal.

3. It is arguable that the decision to proceed without a hearing and to dismiss the appeal in the absence of grounds of appeal was unfair in the circumstances of this case and in error of law."

6. (a) For the appellant Ms Brackaj moved the grounds of appeal. She explained that the IAFT5 was submitted by the appellant's husband and was accompanied by a letter, dated, 13 June 2017 from Northumberland Tyne and Wear NHS foundation Trust Mental Health Act Office at St Nicholas Hospital. That letter confirms that the appellant was detained for 28 days from 9 June 2017 under section 2 of the Mental Health Act 1983.

(b) Ms Brackaj conceded that no grounds of appeal were lodged with the notice of appeal, but explained that it was impossible to frame grounds of appeal because the appellant had been detained under the Mental Health

Act. She told me that that is something which the Judge should have taken account of. Instead, at [4] of the decision, the Judge finds that there are no circumstances to prevent her from determining this case without a hearing. She told me that that is a material error of law, and that if the Judge had considered the letter from St Nicholas Hospital dated 9 June 2017 there would have been a different outcome.

(c) Ms Brackaj conceded that the decision is a decision of a Duty Judge but told me that that decision is not an excluded decision because it bears to be a final determination of the appellant's appeal, it is not a decision on a preliminary matter.

7. For the respondent, Ms Petterson told me that the decision does not contain errors of law, material or otherwise. She reminded me that no grounds of appeal accompanied the IAFT5 form, but acknowledged that the letter from St Nicholas Hospital was a material matter which the Judge had not considered. Taking account of that letter, Ms Petterson offered no more than formal resistance to this appeal.

Analysis

8. An excluded decision is defined in section 11(5) of the Tribunal's Courts and Enforcement Act 2007. The Tribunal's, Courts and Enforcement Act 2007 (Miscellaneous Provisions) Order 2010 SI 41 excludes

(a) Asylum support appeals under section 103 of the Immigration and Asylum act 1999

(b) Decisions made in connection with the bail applications and schedule 2 Immigration Act 1971.

(c) Any procedural, ancillary or preliminary decision made in relation to appeals under sections 82 -83A of the Nationality Immigration and Asylum Act 2002, regulation 26 of the Immigration (EEA) Regulations 2006 or s.40A British Nationality Act 1981.

9. The Judge's decision is not a procedural, ancillary or preliminary decision. At [4] of the decision the Judge records that she considered the papers as a whole and then resolved to determine the appeal without a hearing. The decision that the Judge reaches is

"Appeal Dismissed."

10. There is a competent right of appeal against the Judge's decision to the Upper Tribunal. The competency of the appeal was recognised when the decision was posted to the parties under cover of a letter dated 12 July 2017 which states

'Either party may apply to the First-tier Tribunal for permission to appeal to the Upper Tribunal on a point of law arising from the First-tier Tribunal's decision.'

11. The notice of appeal was submitted by the appellant's husband on 20 June 2017. The notice of appeal refers to the letter from St Nicholas

Hospital dated 13 June 2017 which was attached to the grounds of appeal. That letter clearly states that the appellant was detained in hospital for 28 days from 9 June 2017. The direction to produce grounds of appeal contained a time limit which fell within those 28 days. It is not surprising the grounds of appeal had not been produced by the time this case was referred to a duty Judge.

12. Had the Judge taken account of the appellant's detention under the Mental Health Act, then it is realistically likely that there would have been a different outcome. Had the Judge been fully aware of the facts and circumstances surrounding the submission of the notice of appeal, the Judge would not have reached the conclusion at [4] of the decision that there were no circumstances to prevent determination of the appeal without a hearing.

13. I therefore find that the decision is tainted by a material error of law. I set it aside.

14. The substance of the appellant's case has not yet been determined. The grounds of appeal have not yet been tendered but I am told by the appellant solicitors that they are in a position to accept instructions and frame grounds of appeal without delay.

Direction

15. I therefore direct the appellant to serve on the respondent, and lodge with the tribunal, grounds of appeal within 14 days. Failure to comply with this direction may result in the appeal being dismissed without a hearing under the provisions of rule 25(1)(e) of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014.

Remittal to First-Tier Tribunal

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

17. This case is remitted because the fact-finding exercise has not yet been carried out. A complete re-hearing is necessary.

18. I remit this case to the First-tier Tribunal to be heard before any First-tier Judge other than Judge Herlihy.

Decision

19. The decision of the First-tier Tribunal is tainted by material errors of law.

20. The Judge's decision dated 12 July 2017 is set aside. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed
2018

Paul Doyle

Date 28 February

Deputy Upper Tribunal Judge Doyle