



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/13058/2019

THE IMMIGRATION ACTS

**Decided under Rule 34 Without a Hearing
At Field House
On 2 October 2020**

**Decision & Reasons Promulgated
On 07 October 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**LAKHVINDER SINGH BISLA
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Cohen, dismissing his appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent made on 16 July 2019 to refuse his application for leave to remain on human rights grounds.
2. The appellant did not attend the appeal on 5 December 2019 nor did his representatives. They did, however, make a request by fax for an adjournment on the basis that the appellant was suffering from depression and that an appointment with a consultant psychiatrist had been made but that had not been possible to arrange it until the following week. The

judge decided [21] that there was “insufficient cause” for an adjournment and proceeded to determine the appeal.

3. The appellant sought permission to appeal on the basis that Judge Cohen had erred in not adjourning the appeal where fairness required it and had failed properly to apply the test set out in Nwaige (adjournment: fairness) [2014] UKUT 00418, not even addressing the issue of fairness.
4. On 12 May 2020, First-tier Tribunal Judge Povey granted permission to appeal.
5. On 31 July 2020, my directions in this matter were issued. Those directions are annexed to this decision, but it is relevant to note that they provided as follows:

“Having reviewed the case, it is observed that the judge does not appear to have focussed on the correct test under the procedural rules or to have applied Nwaigwe; any submissions focussing on these issues are likely to assist the Upper Tribunal”
6. Neither party has objected to this appeal being determined without a hearing. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, I am satisfied that in the particular circumstances of this case where no objection to a decision being made in the absence of a hearing that it would be right to do so. In doing so, I have taken into account the representations of both parties.
7. With due respect to the submissions from the respondent, I find that, as the appellant avers, there is no indication that Judge Cohen turned his mind to the correct test, or considered the issue of fairness. At no stage does Judge Cohen ask himself the question of whether there could be a fair hearing. Judge Cohen appears at [21] not to have taken into account why a psychiatric report could not have been obtained earlier despite at [16] to [17] setting out the circumstances. Judge Cohen did not engage either with the fact that the appointment was to assess the appellant; thus, the references to existing treatment are not relevant.
8. This error was plainly material. The appeal proceeded without the presence of the appellant and without his testimony.
9. The appellant has now been assessed. He has been diagnosed as suffering from severe clinical depression, and to be suffering from cognitive difficulties
10. I am in the circumstances, satisfied that Judge Cohen erred in law, and that as a result, the appellants hearing before him was unfair. Accordingly, I am satisfied that a procedural error occurred such that the

decision of First-tier Tribunal Judge Cohen involved the making of an error of law and it must be set aside.

11. As the effect of Judge Cohen's error was effectively to deprive the appellant of a fair hearing, I consider that the only proper course of action is to remit the appeal to the First-tier Tribunal for a fresh determination on all issues. None of Judge Cohen's findings are preserved.

Notice of Decision & Directions

- 1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- 2 I direct that the appeal be remitted to the First-tier Tribunal for a fresh decision on all issues.

Signed

Date 2 October 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX - DIRECTIONS ISSUED ON 31 JULY 2020

MEMORANDUM & DIRECTIONS

1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules¹, I have reached the provisional view that it would in this case be appropriate to determine the following questions without a hearing:
 - (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so
 - (b) whether that decision should be set aside.
2. Having reviewed the case, it is observed that the judge does not appear to have focussed on the correct test under the procedural rules or to have applied Nwaigwe; any submissions focussing on these issues are likely to assist the Upper Tribunal
3. I therefore make the following DIRECTIONS:
 - (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);
 - (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**; in the absence of any response from the respondent it will be assumed that she consents to the proposed course of action set out above.
 - (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.
 - (iv) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.
4. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 3- above must be complied with in every case.

¹ The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

5. If this Tribunal decides to set aside the decision of the First-tier Tribunal for error of law, further directions will accompany the notice of that decision.
6. Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed

Date: 27 July 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul