Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08185/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2020	**On 17 January 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

T A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. K Shoye, Counsel, instructed by CW Law Solicitors
For the Respondent: Mr. D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Eden ('the Judge') issued on 14 October 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.

2. Designated Judge of the First-tier Tribunal Macdonald granted permission to appeal on 28 November 2019.

Anonymity

3. The Judge issued an anonymity direction and the parties did not request that it be set aside. I confirm the direction pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:-

> Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any formal publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid the likelihood of serious harm arising to the appellant from the contents of the protection claim becoming known to the public.

4. The appellant is a national of Nigeria. He asserts that he entered this country in 2006 as a visitor and subsequently overstayed. In 2009 he was convicted of being in possession of a false Nigerian passport and sentenced to six months' imprisonment. In April 2009 he applied for an EEA residence card. The respondent refused the application by means of a decision dated 16 July 2010. In September 2010 he applied for leave to remain on human rights (article 8) grounds and this application was refused by way of a decision dated 6 December 2015. A subsequent appeal was dismissed by the First-tier Tribunal (the 'FtT') by a decision sent to the parties on 31 January 2017. The applicant claimed asylum on 22 November 2017 asserting that he was at real risk of persecution consequent to a land dispute concerning his family home. The respondent refused the application for international protection by means of a decision dated 30 July 2019.

Hearing before the FtT

5. The appellant states that he was admitted to Newham University Hospital on Friday, 20 September 2019 and his solicitors wrote to the FtT on Monday, 23 September 2019 requesting an adjournment of his appeal hearing. They detailed that the applicant was suffering from a severe infection consequent to a leg injury. No corroborative documentation as to his admission and ailment was provided with the adjournment application and it was refused by the FtT on 24 September 2019. The FtT observed that the application could be renewed upon receipt of medical evidence establishing that the appellant was unfit to attend the hearing.

6. The appellant's solicitors renewed the application by way of an e-mail dated 24 September 2019 and provided a handwritten letter from a medical practitioner and two photographs of the appellant in his hospital bed. The letter is addressed "To Whom it May Concern" and is signed by a

medical consultant. The name of the consultant is unclear. The letter provides a date of birth that is consistent with the respondent's records but is said by the appellant at paragraph 1 of his witness statement dated 12 September 2019 to be incorrect.

7. The FtT refused the application on 25 September 2019 observing grave concerns as to failure of the letter to explain the reason to why the appellant had been admitted to hospital and further that there had been a failure to provide a hospital reference number. The decision observes, 'if the appellant fails to attend the hearing [it] will proceed in his absence'.

8. The appeal came before the Judge at Taylor House on 26 September 2019. Neither the appellant, his sister who is a witness in this appeal or his legal representatives attended. The Judge considered whether to adjourn or to proceed in the appellant's absence and determined as to this preliminary issue, at [5]:-

> 'Neither the appellant nor his representatives attended the hearing. Applying rule 28 of the Procedure Rules and the overriding objective, I decided to proceed in the appellant's absence. I was satisfied that the appellant had been notified of the hearing. I considered it in the interests of justice to proceed in the appellant's absence, having particular regard to the need to avoid delay and the duty of parties to co-operate with the Tribunal. The appellant had provided inadequate evidence that he was in hospital and had been clearly told that the hearing would proceed in his absence. His representatives should have provided clear medical evidence with a hospital reference number and a description of his illness from the outset. Even if his representatives had not yet received the refusal of their second application as at the date of the hearing, they should not have assumed that the application would be granted and should have attended the Tribunal hearing. Having read the file, I was satisfied that the evidence before me was sufficient for me to decide the appeal.'

9. The Judge proceeded to find the appellant incredible as to his stated history of being a victim of a land dispute observing at [22] that 'the answers the appellant gave in the asylum interview were vague, somewhat incoherent and lacking in detail'. The asylum and humanitarian protection appeals were dismissed. As for the appellant's article 8 appeal the Judge concluded in dismissing it that the limited evidence presented did not affect the conclusion reached by the FtT in 2017.

Grounds of Appeal

10. The grounds of appeal concentrate solely on one issue, namely the failure to grant an adjournment. Reliance is placed upon *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC). In granting permission to appeal DJFtT Macdonald observed:-

> 'The Judge explained why he was not adjourning the hearing (paragraph 5) but it is at least arguable that there was sufficient information before the Judge to allow him to conclude that the appellant was in hospital and would not be able to attend.'

The Hearing

11. Both representatives at the hearing informed me that the parties considered the Judge's decision to be flawed by legal error, such that it should be set aside. Mr Clarke informed me said that he had had sight of further medical evidence confirming that the appellant was receiving medical treatment in hospital on 26 September 2019 and was discharged from hospital on 1 October 2019. He was therefore satisfied on behalf of the respondent that on the relevant date the appellant remained an in-patient at a hospital and therefore was unable to attend the hearing.

Decision on Error of Law

12. The Judge was not aided by the actions of the appellant's solicitors who failed to attend the hearing but remained on record. The explanation for such failure to attend is detailed within the grounds of appeal as the appellant having instructed them not to attend the hearing due to cost. No steps were taken by the solicitors to contact the hearing centre at Taylor House on the morning of the hearing, either by telephone or email, to confirm the present situation in relation to the appellant's stay in hospital. A solicitor with conduct of an appeal should be mindful of the fact that whilst remaining on record they are required to comply with their duties to the FtT and not to hinder the administration of justice. The decision of the solicitor with conduct of the appeal to abide by the appellant's instruction not attend the hearing, and then to subsequently fail to provide the FtT with an update as to the present position, causes concern as to whether clarity of thought was given to the duty placed upon them. At the very least the Judge would have been aided by communication on the morning of the hearing as to whether or not the appellant remained in hospital or had been discharged. It may well be that if the Judge was made aware that the appellant remained in hospital, a different decision would have been made as to the adjournment request.

13. Rule 4(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 empowers the FtT to adjourn a hearing. Consideration has to be given to Rule 2 which sets out the overriding objectives under the Rules that the FtT 'must seek to give effect' to when exercising any power under the Rules. The overriding objective is to deal with cases fairly and justly. Ultimately the issue arising in this appeal is one of fairness. In *Nwaigwe* it was confirmed at [7] that if the FtT refused to accede to an adjournment request, such decision could in principle be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial

considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. In circumstances such as this appeal where an adjournment refusal is challenged on fairness grounds, this Tribunal is required to recognise that the question is not whether the FtT acted reasonably, rather the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? The Court of Appeal confirmed in *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284, at [13] that when considering a refusal to adjourn 'the test and sole test was whether it was unfair'.

14. I have sympathy with the Judge who was provided with insufficient information as to the appellant's medical condition and was unaware as to whether the appellant remained a patient at the hospital on the day of the hearing. The medical letter is sparse in detail. I observe that the letter is presented on NHS notepaper with a stamp from Newham University Hospital. It is not said to be a forgery and therefore as at Tuesday, 24 September 2019 the appellant was an in-patient at the hospital. Both the decision of the FtT in refusing to adjourn by means of its decision of 25 September 2019 and the Judge were critical as to the lack of detail contained within the letter, including the lack of a patient reference number. However, King LJ has reminded the judiciary when considering adjournment requests that they are to have in mind the pressure medical practitioners work under and the difficulties that may be faced in obtaining a report containing more detailed information than the bald details found in a sick note: *Emojevbe v Secretary of State for Transport* [2017] EWCA Civ 934, at [31].

15. Coulson LJ held in *General Medical Council v Hayat* [2018] EWCA Civ 2796, at [37], that there must be evidence that an individual is unfit to participate in the hearing, that such evidence must identify a proper particularity of the individual's condition and explain why that condition prevents that participation in the hearing. Moreover, that evidence should be unchallenged. There is to be rigorous scrutiny of evidence adduced in support of an application for an adjournment on the grounds that a party is unfit on medical grounds to attend a hearing. Such scrutiny forms part of the overriding objective assessment.

16. Ultimately the evidence presented by the appellant was that he was a hospital in-patient and had been for several days, though this information was some two days old when considered by the Judge, and I again observe that it is unfortunate that no-one from the appellant's solicitors took the step to inform the Tribunal at the morning of the hearing that the appellant remained in hospital. However, I am satisfied upon considering the evidence filed with this Tribunal that the appellant was in hospital on the day of the hearing before the Judge and remained there until 1 October 2019. In such circumstances, where an appellant wishes to pursue his appeal in relation to seeking international protection and is at the

relevant time a hospital in-patient, it cannot be said that a fair hearing could occur in his absence. In those circumstances I am in agreement with the representatives before me that this decision should be set aside. I observe that it is the evidence postdating the hearing that has proven to be conclusive and the Judge cannot be overtly criticised when limited information was placed before the FtT.

Remittal

17. As to remaking the decision, given the fundamental nature of the error of law that has been identified, I note the submissions made by both Mr Clarke and Mr Shoye that sustainable findings of fact have yet to be made in this matter and to date the appellant has not enjoyed a fair hearing. Both representatives submitted that the appeal should be remitted to the First-tier Tribunal. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. It reads as follows at paragraph 7.2:-

> The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless 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 remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

18. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has not yet enjoyed an accurate consideration of his asylum claim to date and has not had a fair hearing.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 14 October 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

20. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge of the First-tier Tribunal other than Judge Eden. No findings of fact are preserved.

21. An anonymity direction is confirmed.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 14 January 2020