Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10326/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2022	**On 06 May 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MD
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Andrew sent on 8 August 2019 dismissing his appeal against a decision of the Secretary of State dated 6 August 2018 refusing his protection and human rights claim.

Background

2. The appellant is a citizen of Guinea born on 7 July 1990. He entered the UK on 4 March 2007 as an unaccompanied minor and claimed asylum. His asylum claim was refused and he was granted discretionary leave to remain until 7 January 2008. An application to extend his leave was refused on 2 July 2011. His appeal was dismissed on asylum and Article 8 ECHR grounds and his appeal rights were exhausted on 26 October 2011. He lodged a fresh claim in 2015 with further documentation in support of his asylum claim. On 15 November 2016 the appellant was served with a decision to make a deportation order. The appellant made representations. The Secretary of State then took the decision to refuse the human rights and protection claim which is the subject of this appeal.

3. The appellant has been convicted of various offences. On 2 November 2016 he was convicted of 4 counts of intention to supply class A drugs and he was sentenced to 2 years and 8 months imprisonment.

4. The respondent's position is that there is no risk of the appellant suffering serious harm on his return to Guinea. The respondent relies on the findings of the previous Tribunal in 2011 and generic information on Guinea. The respondent also considers that the deportation of the appellant is in the public interest because he is a foreign national offender, and he does not meet either Exception of s117C of the Nationality Immigration and Asylum Act 2002 and there are no very compelling circumstances over and above the Exceptions as to why he should not be deported.

5. The appellant argues that he is at risk of persecution or treatment contrary to Article 3 ECHR in Guinea because of his and his father's association with a trade union movement. He submitted further evidence in respect of his asylum claim with his fresh claim including an arrest warrant.

The decision of the First-tier Tribunal

6. On the day of the hearing the appellant was represented by Mr Mupara. The appellant did not appear. The judge was informed that the appellant was late and on his way. The representative applied for an adjournment in order to obtain a psychiatric report. The judge refused the adjournment. The judge was then informed that the appellant had heatstroke, had a nosebleed and gone to the hospital. The representative indicated that he wished to make a second adjournment application. The judge did not allow a second application for an adjournment without any supporting evidence. The judge proceeded to hear the appeal in the absence of the appellant. The representative withdrew. Later the judge received evidence that the appellant had attended a walk in centre with a nosebleed.

7. The judge did not have the appellant's bundle before him. A bundle had been prepared and the representative said it had been forwarded to the Tribunal but there was no record of receipt. The representative was not

able to provide a photocopy. The bundle was received by the Tribunal after the hearing but the documents in the bundle are not referred to in the decision.

8. The judge dismissed the asylum and protection appeal in a very short paragraph in which she stated that there was no evidence before her to depart from the findings of the previous Tribunal The judge found that it was not a breach of Article 8 ECHR to deport the appellant from the UK.

Grounds Appeal to the Upper Tribunal ('UT')

Ground 1` - The judge failed to consider the issue of fairness in refusing the adjournment application.

9. The appellant's representative explained why the appellant had not been able to obtain a psychiatric report and his explanation was reasonable. The comment that the representative who was booked to attend the hearing should have known about compliance because she is a part time First-tier Judge is immaterial to the issue of fairness. The appellant's representatives were not aware of his new address as he had been released from custody the day before the hearing. The judge did not entertain the second application for an adjournment. At no point did the judge indicate that she had considered the issue of fairness. The judged erred in applying a test of reasonableness.

Ground 2 – The decision to refuse to adjourn was procedurally unfair

10. The judge was informed that the appellant was unable to attend the hearing on medical grounds because he had suffered heatstroke and needed to go to hospital. 25 July 2019 was the hottest day of the year. Evidence of the appellant's attendance at hospital was served on the day of the hearing.

Ground 3 – Failure to take into account material evidence

11. Subsequent to the hearing the appellant's representative forwarded a 129-page bundle of documents to the Tribunal. These included a country expert report and various documents relevant to the asylum claim. The judge did consider these documents

Permission

12. Permission to appeal was granted by First-tier Tribunal Judge Gibbs on 28 December 2021 on all grounds. There is no explanation for the delay between the application for permission and the grant of permission.

13. I was not provided with a Rule 24 response from the Respondent.

Error of Law

14. At the outset of the hearing, Mr Tufan for the respondent conceded that there had been procedural unfairness in that the judge had not directed herself to the relevant authorities on adjournments and did not demonstrate in her decision that she had considered the issue of fairness when refusing to adjourn the appeal.

15. I am in agreement with the respondent and satisfied that the decision contained material errors of law, such that it should be set aside.

16. The judge appears not to have understood the reason for the delay in providing the psychiatric report. There was a straightforward explanation in that the appellant was in receipt of funding from the Legal Aid Authority and funding had been put in place for a London based psychiatrist to visit him in Harmondsworth immigration detention to prepare a report. Unfortunately, before the psychiatrist could visit, the respondent moved the appellant to Morton Hall in Lincolnshire which meant that he was obliged to find a local solicitor under the Legal Aid Authority rules and he had difficulties in finding a local supplier between May and July 2019. Further since the expert would need to travel from London the cost would increase, and further authorisation from the Legal Aid Authority would be needed. Having failed to find a local solicitor he reinstructed his previous solicitor.

17. The appellant had previously indicated at the Case Management Review hearing that he would be obtaining medical evidence. It was for the judge to ascertain the precise reason for the delay and from the decision it is apparent that she has not done so. At [21] she referred to the "somewhat confused explanation". Her conclusion for finding that the appellant had "more than sufficient time" to obtain this evidence is not sustainable when she did not properly understand the reason for the delay.

18. The judge also erred by not going onto consider whether fairness demanded that there be an adjournment for this evidence to be provided. The judge made no mention of the "overriding objective" of the Tribunal Procedural Rules to deal with a case "fairly and justly" which should have included the relevance of this medical evidence to the appellant's appeal, how likely/soon it was to become available, and the importance of the appeal to the appellant.

19. Further and importantly the judge does not direct herself to the relevant tests in respect of adjournments including Nwaigwe (adjournment: fairness) [2014] UKUT 00418 and SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 (IAC). The question of whether an appeal should be adjourned will turn on the issue of fairness not reasonableness. There is no indication from the decision that the judge has considered whether the appellant would be deprived of a fair hearing if he did not attend.

20. I add as an aside that I do not consider it helpful or appropriate for the judge to refer to a "would be" advocate who did not in the event appear, as "being a First-tier Tribunal Judge herself" who should know the

importance of compliance. The grounds rightly point out that Counsel, who was due to appear but did not, was instructed by the representatives, and it is for the representatives to ensure that directions are complied with. This is an immaterial consideration, and it was an error for the judge to take this consideration into account.

21. I am satisfied that Ground 1 is made out in that there has been procedural impropriety. This is further compounded by the judge's refusal to even entertain a further application for an adjournment, once it became apparent that the appellant was on his way to seek medical attention for a nosebleed caused by heatstroke. At this juncture the judge should have again considered whether it was fair to proceed in the absence of the appellant. The relevant question was not whether there was any medical evidence but whether it was fair to proceed. In any event it seems that some medical evidence was forwarded to the Tribunal that the appellant sought medical attention following a nosebleed.

22. In light of the above, we are satisfied that the decision of the First-tier Tribunal contains a material error of law and that the decision should be set aside in its entirety.

23. We have formed the view that this matter should be remitted to the First-tier Tribunal to be heard *de novo* with no findings preserved owing to the nature of the error.

24. For the benefit of the First-tier Tribunal, we record that the appellant relayed to us that he is now living in Dagenham in which case it may be appropriate to list his appeal at Taylor House. Further the appellant informed us that he has now instructed North Kensington Law Centre to represent him.

25. The Appellant should be under no illusion that because the refusal to adjourn the appeal has been found to be unlawful on this occasion, that any future decision to refuse to adjourn will necessarily be unlawful.

Notice of Decision

26. The decision of the First-tier Tribunal involved the making of an error of law.

27. The decision is set aside in its entirely with no findings preserved.

28. The appeal is to be remitted to be heard de novo by the First-tier Tribunal by a judge other than Judge Andrew.

Anonymity order

29. I maintain the anonymity order made by the First-tier Tribunal.

Signed Upper Tribunal Judge Owens

Upper Tribunal Judge Owens Date 25 April 2022