IAC-FH

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11779/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 October 2015	**On 30 October 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL HUTCHINSON

Between

RN
(Anonymity Direction Made)

Appellant

And

SECRETARY OF STATE

Respondent

Representation:
For the Appellant: Miss A Nizani, Counsel, instructed by Bespoke Solicitors
For the Respondent: N. Willocks –Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against the decision promulgated on 24 April 2015 of First-tier Tribunal Judge Watt who dismissed the appeal of RN.

Background

2. The appellant is a citizen of Pakistan who arrived in the UK on 21 October 2013 and claimed asylum on 13 January 2014. The respondent by decision dated 11 December 2014 refused to grant asylum.

3. The appellant appealed against that decision. The appellant's appeal came before the First-tier Tribunal on 14 April 2015. Judge of the First-tier Tribunal Watt dismissed the appeal on asylum and human rights grounds. As a preliminary matter the judge considered that a fax was received by the appellant's solicitors indicating that they had only been instructed on that day by the appellant and an adjournment requested. The file notes that the application was refused as no reason was given for the adjournment request. The judge notes that on the morning of the hearing Mr Chipperfield of Counsel appeared indicating that he had received instructions that morning to make a further request for an adjournment indicating that the solicitors had only just been instructed but no reason for the late instruction given. The judge decided to refuse the adjournment. Although not specifically indicated in the determination both parties before me confirmed that Mr Chipperfield did not represent the appellant in the substantive appeal but only in the adjournment request.

4. The judge further noted that the appellant was not present and proceeded with another case. However when the appellant had not appeared by 2pm the judge proceeded to hear the case in the absence of the appellant.

Permission to Appeal

5. The appellant sought permission to appeal to the Upper Tribunal on the basis firstly that the judge's consideration of the appellant's child's best interests was inadequate and secondly that it was unfair to proceed, particularly where a child was involved and this prevented the Tribunal from examining the respondent's Section 55 duty in respect of the child.

6. Designated Judge of the First-tier Tribunal Zucker granted permission to appeal on 24 July 2015 on the basis that there was an arguable error of law as a child was affected by the outcome and therefore arguably paragraph 27 of the judge's determination amounted to inadequate reasoning and arguably the appellant should have been given one chance to appear on a later date.

7. The appeal then came before me. Miss Nizani advised that the appellant was present but outside the court room with her young son. In relation to the second ground she argued that there was case law which indicated that where a representative declines to act an adjournment should have been given. Although she referred to the case being listed in 'ILPA' best practice guide, she had no neutral citation reference and I am not satisfied that she has complied with the relevant practice direction in relation to reliance on unreported cases. It was her submission that she had been instructed by the appellant that the appellant did not actually know about the appeal hearing and it was only when she was contacted by someone connected with her representatives that she subsequently found out that she had missed a case. Miss Nizani had also been instructed that the appellant had not received post and did not appreciate that she had had a previous adverse decision against her. She said the appellant was very

clear that she had not asked for an adjournment so it was not clear why the representatives had done so. Miss Nizani indicated that instructing solicitors had indicated that the case worker formerly dealing with the case was no longer with the firm so it was not possible to ascertain the exact circumstances.

8. In relation to the best interests ground Ms Nizani argued that the best interests consideration was cursory and Ms Nizani rehearsed matters set out in the grounds of appeal, including in relation to JO and Others (Section 55 duty) [2014] UKUT 00517 (IAC).

9. Ms Willocks-Briscoe (who had also appeared for the respondent before the First-tier Tribunal) relied on the Rule 24 submission in respect of the best interests grounds and submitted that there was no indication that was anything else to consider and in all the circumstances the judge's consideration of the best interests of the child had been set out appropriately.

10. In respect of the adjournment ground Ms Willocks-Briscoe referred me to the judge's determination where he detailed that no reasons had been given as to why the adjournment request was required. Counsel had informed the Tribunal on the day that he was unable to assist the Tribunal as to why the appellant had not turned up. The appellant had every opportunity to put her case forward and had had at least four months to prepare her case. She submitted that had good reasons been given for requesting an adjournment and that adjournment not been granted then there might be force in the unfairness argument.

My Findings

11. Although the judge at paragraphs 11 and 12 refers to the adjournment request of the previous day containing no reason given for the adjournment (and I note that the Tribunal notice dated 13 April 2015 states that this was the case) the fax from the appellant's solicitors also dated 13 April stated that 'Ms N has had some personal issues and as recently as today has instructed us to lodge this request for an adjournment'. However no further details are given as to the reason for requesting an adjournment.

12. It is of concern that Ms Nizani before me appeared to have completely different instructions, stating that the appellant was not even aware of her hearing and had not received the notification of hearing. Clearly either the appellant or her solicitor have not been completely truthful with the Tribunal. I also note that with the 13 April 2015 fax to the Tribunal the appellant's solicitors included an email dated 13 April 2015 from the appellant to her solicitors which instructed them to act for her.

13. I note that the address for service on the appellant, held by the Tribunal, was care of her solicitors. The Tribunal did not have an address for the appellant. Given this and given the appellant's non-attendance at the

hearing I accept that it may have been possible that she had not, for whatever reason, received written notification of her appeal (as she claims) and it was her representative who was being less than truthful in his fax of 13 April 2015 which referred to having instructions from the appellant including that she was 'unable to proceed with the hearing scheduled for tomorrow at 10:00am'. However this explanation is unlikely in my view given the email from the appellant to her solicitor, also dated 13 April 2015, with her form of authority.

14. I have considered the decision of the President, Mr Justice McCloskey, in Nwaigwe (Adjournment: Fairness) [2014] UKUT 00418 (IAC). The crucial question is not whether the decision of the First-tier Judge was reasonable, but whether the refusal deprived the affected party of her right to a fair hearing.

15. I have considered the Presidential Guidance 2014 which sets out the factors weighing in favour and against an adjournment. In favour this includes

> '... sudden illness or other compelling reason preventing a party or a witness attending a hearing. Normally such a reason should be supported by medical or other relevant evidence, unless there has been insufficient time to obtain such evidence.'

Factors which are said in the guidance to weigh against the granting of an adjournment are that:

> '(a) the application to adjourn is not made at the earliest opportunity.
>
> (b) the application is speculative, such as, for example, a request for time for lodging further evidence where there is no reasonable basis to presume that such evidence exists or could be produced within a reasonable period.
>
> (c) The application does not show that anything material would be achieved by the delay, for example, where an appellant wants more time to instruct a legal representative but there is no evidence that funds or legal aid is available.
>
> (d) The application does not explain how the reason for seeking an adjournment is material to the case, for example where there is a desire to seek further evidence but this evidence does not appear to be material to the issues to be decided.
>
> (e) The application seeks more time to prepare the appeal when adequate time has already been given. In such circumstances, the Tribunal may take into consideration a failure to comply with direction. However, a failure to comply with directions will not be sufficient of itself to refuse an adjournment.'

16. Although on balance I am inclined not to accept that the appellant is without fault in this matter, given the conflicting instructions and the fact that she was in email contact with her solicitors the day before the

hearing. However taking into account that the fax to the Tribunal the day before the hearing indicated the appellant's 'personal issues' and her subsequent non-attendance I am prepared to accept that there is a possibility that she may have understood that she did not have to attend (however erroneous that understanding may have been). Although this may have involved less than correct advice from her then advisor and/or sharp practice in order to obtain more time to prepare, it is not possible to say, particularly since the Tribunal is told that this advisor is no longer with the instructing solicitors.

17. On balance therefore, although a marginal case and the judge acted reasonably, that is not the test. I find that there was a material error of law as the decision did deprive the appellant of a right to a fair hearing, in particular the right to give evidence to address both the respondent's credibility conclusion and the decision in relation to the child's best interests. In light of all the circumstances and the issues to be decided, which involved an asylum claim and the best interests of a minor, the appellant ought to have been given one last opportunity to attend

18. Although academic as I have found an error of law I am not satisfied that the judge's consideration of the child's best interest, of itself, discloses any error. It is difficult to see how the judge could have made any other findings on the basis of the material in front of him.

19. I find that the decision of the First-tier Tribunal erred materially in law for the reasons identified.

Notice of Decision

20. The appeal is allowed. The determination of the First-tier Tribunal is set aside. No findings are to stand, Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 (b), the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Watt.

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 28 October 2015

M. M. Hutchinson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

As there was no fee available there can be no fee award

Signed Date: 28 October 2015

M. M. Hutchinson
Deputy Judge of the Upper Tribunal