Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03745/2010

THE IMMIGRATION ACTS

Heard at Field House
On 16 October 2013

Determination Sent
On 15 November 2013

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

NAHEED RIAZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No representation
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 12 November 1984, is a citizen of Pakistan whose application for asylum was refused by the respondent on 25 February 2010. It is her case that she would be at risk on return because of her Ahmadi faith.

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2. The appellant appealed against this decision and her appeal was heard before Immigration Judge M A Khan, sitting at Hatton Cross on 29 April 2010, but in a determination dated 6 May 2010 and promulgated shortly thereafter, Judge Khan dismissed her appeal.

3. The appellant appealed against this decision, and was granted permission to appeal by Senior Immigration Judge Eshun on 28 May 2010. When setting out her reasons for granting permission, Judge Eshun stated as follows:

> "…The grounds disclose an arguable error of law by the IJ's failure to consider the medical evidence."

4. Thereafter, on 30 July 2010, Judge Eshun found, without a hearing, that Judge Khan's determination had contained an error of law such that his decision must be set aside and re-made by the Upper Tribunal. Her reasons were as follows:

> "Having regard to all the circumstances, including the failure of the respondent to serve within the permitted time a response, which adequately explains why the decision of the First-tier Tribunal does not contain an error of law and should not be set aside, the Upper Tribunal, pursuant to Rule 34, has decided without a hearing that the decision of the First-tier Tribunal does contain an error of law, as identified in the grant of permission, read with the grounds of application, and should be set aside and re-made by the Upper Tribunal."

5. Judge Eshun also noted as follows:

> "The grounds of appeal claimed that the appellant was not fit to give evidence in the environment of the Tribunal as it was then constituted. In their reply to directions, the appellant's solicitors have indicated that the appellant will give evidence at the hearing before the Upper Tribunal. It is on this basis that the hearing will proceed."

6. The appeal then came on for hearing before a panel at Field House consisting of Senior Immigration Judge Waumsley and myself, on 14 September 2010.

7. At that hearing, the appellant gave evidence, and was asked some questions in cross-examination, but the appellant appeared to be unable to concentrate fully. Ms Balani, who was then representing the respondent, considered that it would not be in the interests of justice for the appellant to continue being cross-examined, having regard to her state as it then appeared. After some discussion, the hearing was adjourned to the first available date after 14 December 2010, it then being estimated that at least a further three hours would be needed.

8. Thereafter, for reasons of which I am unaware, but which were not the fault of either party, the appeal was not re-listed until 7 September 2012, when it was re-listed just before myself, Judge Waumsley having by then retired.

9. At that hearing, it was agreed on behalf of both parties that the entire case should be heard afresh, and at that stage both parties were content that I should continue to hear it. However, on instructions, Ms Jegarajah (who was then appearing on behalf of the appellant) applied for an adjournment because a country guidance decision was imminent with regard to the position of Ahmadis in Pakistan and on behalf of the respondent, Mr Avery did not oppose this application.

10. I granted this application, because I considered that the country guidance case, in which evidence had by then been concluded (this was *MN & Others (Ahmadis – country conditions – risk) Pakistan CG* [2012] UKUT 00389) might very well have a significant impact on this appeal, in particular with regard to the cross-examination which might be necessary in light of the guidance which was soon to be given. In those circumstances, I considered that it was not in the interests of justice for this appeal to be heard until that new country guidance decision had been promulgated. I should add that I did not formally make any decision as to whether or not it would be appropriate for me to continue to hear this appeal in any event, as I was and remain concerned that although I did not have any clear recollection of the evidence that had been given before me some two years earlier, I might nonetheless be influenced by that evidence without necessarily realising that this was so.

11. The country guidance decision of *MN* was subsequently promulgated in November 2012 following which the appeal was re-listed before me on 28 January 2013. At that hearing, the respondent was represented by Ms Tanner, but regrettably she was not in possession of the file, because although it had been requested from storage, it had not been delivered. Ms Tanner was accordingly not in a position to inform the Tribunal as to what course the respondent proposed to take in light of the new country guidance which had been given. However, Ms Tanner indicated to the Tribunal that she expected to receive the file shortly and that she would give her personal attention to it when it was received, with a view to informing the Tribunal shortly thereafter as to the respondent's position in light of the decision in *MN*.

12. Thereafter, it appears that on 19 February 2013, Ms Tanner wrote a letter on behalf of the respondent, which was intended to be sent to the Tribunal, in which she wrote, on behalf of the respondent, as follows:

> "It is confirmed that the refusal is maintained as although it has been accepted that the appellant was an Ahmadi very little else has been accepted by the respondent regarding the core of her claim."

13. In that letter, the Tribunal was requested to list the appeal for a substantive hearing.

14. Regrettably, it does not appear that this letter was received by the Tribunal (because it is not in the Tribunal file). It is apparent that this letter was also not received by the appellant's solicitors (to whom it should have been sent following the directions which I gave on 28 January 2013) because on 9 September 2013 they wrote to the Tribunal, referring to an earlier letter they had written to the respondent on 3 May

2013, requesting the respondent to notify them as to whether or not they still intended to contest the appeal, but saying that no response had been received.

15. By that time I had already given instructions for the appeal to be re-listed before me for mention, which is why the appeal again came before me on 16 October 2013.

16. Prior to that hearing, the appellant's solicitors requested that they be allowed not to attend, but supplied written submissions for consideration by the Tribunal at this hearing. The Tribunal considered that it could deal justly with the matters which needed to be dealt with at this hearing without the attendance of the appellant's solicitors, and for this reason their attendance was not required, but the Tribunal did take full note of the written submissions which they had sent.

17. The appellant's solicitors asked that the appeal be allowed (effectively without a hearing) but that in the event that the Tribunal considered that the appeal should proceed to a full hearing, it be re-listed "in one of the First-tier Tribunals in London". The Tribunal was informed that the appellant and one other witness would give evidence, that both would require an Urdu interpreter and that it was estimated that three hours would be required for the hearing.

18. On behalf of the respondent, Mr Deller accepted that it appeared from the submissions received by the Tribunal on behalf of the appellant that neither the appellant nor the Tribunal had seen Ms Tanner's letter of February 19, 2013, but it was the respondent's position that she still wished to contest the appeal.

19. Clearly the appeal cannot simply be allowed without a hearing, as the appellant's solicitors have requested, and so it will have to be re-heard, and the hearing will have to be a fresh hearing. In my judgment there are no findings which can be retained from Judge Khan's original determination.

20. Having given full consideration to whether or not I could properly continue to hear this appeal, I do not consider that this would be appropriate, as I would not know whether or not I would be influenced by evidence which I half remembered from the earlier hearing. Having had regard to paragraph 7 of the President's Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal, I consider that the effect of the errors contained within the determination as identified by Upper Tribunal Judge Eshun (in particular Judge Khan's failure to consider the medical evidence before assessing credibility) were such that the appellant was effectively deprived of a fair hearing. I consider further that the nature and extent of the judicial fact-finding which will now be necessary in order for this decision to be re-made (a fresh hearing de novo) is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal, as requested on behalf of the appellant, and I shall so order. I accordingly make this decision below, and shall also give directions for trial.

Decision

The determination of First-tier Tribunal Judge M A Khan having been set aside as containing a material error of law, I now direct that this appeal be remitted for a re-hearing by the First-tier Tribunal, sitting at Hatton Cross, to be put before any judge other than First-tier Tribunal Judge M A Khan.

Signed: Date: 31 October 2013

Upper Tribunal Judge Craig