Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08567/2019 (P)

THE IMMIGRATION ACTS

No hearing	**Decision & Reasons Promulgated**
On 4 December 2020	**On 15 December 2020**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[A L]

Respondent

DECISION AND REASONS

1. This is the Secretary of State's appeal. The Respondent, whom I shall call "the claimant" claims to be a national of Eritrea, at risk of persecution there because of his liability to military service. His asylum, claim was refused on 22 August 2019 and he appealed. His appeal was heard by Judge O'Rourke.

2. There was no appearance by or on behalf of the Secretary of State at the hearing. Judge O'Rourke heard oral evidence from the claimant and considered the material on file. He accepted the claimant's account of his nationality and the risks of being in Eritrea and so allowed the appeal.

3. The Secretary of State appeals solely on the grounds of procedural unfairness. The grounds are as follows:

> "The Judge of the First-tier Tribunal has made a material error of law in the Determination.
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> Introduction
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> The appellant's appeal was allowed on asylum grounds.
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> 1. Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings.
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> a) At [12] of the determination the First Tier Tribunal Judge (FTTJ) states,
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> > "Notification was received from the Respondent's Cardiff Representation unit that no Home Office Presenting Officer would attend today's hearing. As the Respondent has had due notice of this hearing and he Appellant was ready to proceed, I considered it in the interests of justice to do so."
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> b) It is respectfully submitted that the FTTJ has incorrectly treated the adjournment request (attached as separate email) submitted on 9/12/2019 as a notification that no Presenting Officer would attend, rather than the application for an adjournment of the hearing. It is submitted that no reference is made to the refusal of the adjournment and no reasons provided by the FTTJ for why this application was refused.
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> c) It is noted from the adjournment request, that the adjournment was sought as the presenting officer that was due to attend was unable to attend due to sickness. It is also noted that the adjournment request also states that counsel was unable to accept instructions due to short notice. It is noted that the adjournment was refused as it was considered that alternative counsel could be instructed. It is submitted that the refusal of the adjournment request by the duty Immigration judge fails to take into account the difficulty in obtaining alternative counsel at short notice.
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> d) It is argued that the refusal to consider the adjournment request by the FTTJ has led to procedural unfairness as the respondent was unable to challenge the evidence of the appellant at the hearing. Given that the appellant's nationality was in dispute, it is submitted that this inability to challenge the appellant's evidence has resulted in a procedural unfairness has materially affected the outcome of the hearing.
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> e) Reliance is placed on the findings of the Upper Tribunal in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) head note of which states,
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> > "If a Tribunal refuses 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 practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal 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? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."

Permission to appeal is respectfully sought.

An oral hearing is requested."

4. Permission was refused by the First-tier Tribunal because the adjournment request, said to be attached the application, was not attached and could not be found on the file. Judge Coker in the Upper Tribunal granted permission to appeal, apparently without seeing the adjournment request. On 7 April 2020 I directed that it be provided within 14 days. Mr Lindsey, on behalf of the Secretary of State responded, but without sending a copy of the adjournment request, despite purporting to attach it. Not until 29 July 2020 did the Secretary of State produce this document which ought to have formed part of the original application for permission, for which time expired early in January 2020.

5. It is now clear that what happened was as follows. The hearing before Judge O'Rourke was listed to take place on 10 December 2019. On the previous day, 9 December, at 10:42am, a Presenting Officer emailed the Tribunal as follows:

> "Dear Sirs,
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> I am writing to request an adjournment for the cases in List 4 tomorrow (10th December 2019). Jan Lewis is the allocated Presenting Officer who is dealing with the list. However, she has telephoned me this morning to confirm that she is unwell. She is therefore unable to prepare for her list today and is not well to go to court to present her list tomorrow. Due to this unforeseen circumstance and that we do not have another PO available to take over her substantive cases and to present the cases in the Tribunal at this short notice, I would respectfully request an adjournment of these cases. Neither party would be prejudiced by an adjournment, a Presenting Officer needs to be available to cross-examine and test the evidence in court, and it is submitted that adjourning would be in the interests of justice to ensure that the Secretary of State is represented at these hearings. We have contacted Counsel who we regularly instruct to ascertain their availability but due to the short notice, they are already booked."

6. The application was put before the Duty Judge at Newport, and at 13:49 a response was sent by email as follows:

> "Your request has been placed before the Duty Judge, Judge Osborne, who has instructed that the adjournment request is refused and has directed that alternative counsel should be instructed."

7. It is not suggested that the Secretary of State made any attempt to take the matter further, for example by making further attempts to instruct counsel outside the small group of "Counsel who we regularly instruct". The adjournment request was not renewed.

8. Judge O'Rourke wrote as follows:

> "[12] Notification was received from the Respondent's Cardiff Representation unit that no Home Office Presenting Officer would attend today's hearing. As the Respondent has had due notice of this hearing and the Appellant was ready to proceed, I considered it in the interests of justice to do so."

9. I directed that the parties make written submissions in the light of the need to take into account the difficulties posed by the pandemic. The parties were asked to give any reasons why determination of the question whether there had been an error of law should not be determined without a hearing. Substantive submissions were filed by Mr Lindsey on behalf of the Secretary of State and Mr Dieu on behalf of the claimant. Although the Secretary of State's original position, unsupported by any reasons, was that she requested a hearing, Mr Lindsey made no submissions on procedure. Mr Dieu said that he requested a hearing "to be able to engage fully with the Tribunal and the arguments presented or later to be submitted by the [Secretary of State]". I have no idea what it was that Mr Dieu wanted or needed to say that he could not say in writing. I have considered the material before me. In my judgment fairness does not require a hearing in this case. The parties have set out their positions and there is nothing more that I need in order to make my decision.

10. Mr Lindsey relies on the grounds of appeal, to which he adds the following:

> "<u>Submissions</u>
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> 6. As can be seen from the adjournment application dated 9 December 2019, the SSHD was unpresented before the FtT due to non-availability of any Presenting Officer or counsel. Reasonable efforts had been made to secure representation.
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> 7. The response of the Duty Judge, Judge Osborne (also 9 December 2019) refusing the adjournment request fails, with respect, to adequately engage with the application. The SSHD was directed by that response to instruct alternative counsel. However, this was not possible in the circumstances, as had already been communicated to the Tribunal.
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> 8. It appears that the FtT Judge who decided the appeal, Judge O'Rourke, was not aware that an adjournment request had been made by the SSHD prior to the hearing. At any event, the Tribunal did not refer to that request in its determination.

9. The Judge stated at [12] that:

> "Notification was received from the Respondent's Cardiff Representation unit that no Home Office Presenting Officer would attend today's hearing. As the Respondent has had due notice of this hearing and the Appellant was ready to proceed, I considered it in the interests of justice to do so."

10. With respect, this statement does not fully and accurately reflect the SSHD's position as set out in the adjournment application. It was clear from the application that the SSHD wished to be represented at the hearing, and this fact was not considered by the Judge.

11. It is respectfully submitted (and the Upper Tribunal is invited to take judicial notice of the fact) that usual Tribunal procedure in circumstances where one party to an appeal is unrepresented is to contact that party, via the Tribunal's clerk. This is particularly so in circumstances where the party has indicated in writing that they have not been able to arrange representation, despite efforts to do so having been made.

12. It is respectfully submitted that, had the Tribunal followed this course and contacted the SSHD (via the Presenting Officer' Unit in Cardiff), there is clearly a realistic possibility that the hearing would have been adjourned. It is noted that the adjournment application contained full contact details for the relevant Home Office official. The Tribunal was expressly invited to notify that named contact, if any further information was needed.

13. The fact that the SSHD was not contacted by the Tribunal on the day of the hearing arguably amounted to procedural unfairness; and that fairness was material to the outcome."

11. It appears to me that these submissions operate under a misapprehension. There was no application for Judge O'Rourke to consider. The only application that had been made had been decided judicially the previous day, and the Secretary of State had been notified of the decision. It would in the circumstances have been quite wrong for Judge O'Rourke to consider it. The Secretary of State was aware of the decison, and knew that the present position (in the absence of any further application by her) was that the hearing would proceed without representation from her side.

12. It is in the light of those facts that the complaints in paragraphs 8-11 of the submissions fall to be considered. This was not a case where the lack of a Presenting Officer was unexplained. On the contrary, the adjournment application had made it clear that a Presenting Officer was not to be expected. And the fact that the Secretary of State had received and apparently accepted Judge Osborne's decision meant that everybody involved was entitled to think that the Secretary of State chose not to take the mater any further. As Mr Dieu puts it in his submissions:

> "It was open to the [Secretary of State] to inform the Tribunal, and renew her application, if it were the position that even alternative counsel couldn't

> be found. The [Secretary of State] having failed to do so it was not on the Tribunal to be chasing any party as to how they might conduct their case".

13. I agree entirely.

14. Paragraph 6 of Mr Lindsey's submissions raises a complaint about Judge Osborne's decision. That formed no part of the grounds of appeal against Judge O'Rourke's decision, and rightly so. If the Secretary of State thought that there was something wrong with Judge Osborne's decision she should have taken the matter up promptly, instead of waiting silently and only objecting when the substantive decision went against her. In any event, as already pointed out, the application did not suggest that it was not possible to instruct counsel. It merely sought indulgence because those regularly instructed were not available.

15. It seems to me that Judge O'Rourke was not misinformed and did not behave in a way that was unfair. What is being asserted on behalf of the Secretary of State is that Judge O'Rourke should have granted her an indulgence that she did not seek from him, in order to reduce the chances of her losing this appeal. If he had done so, that certainly would have been unfair. Indeed, it would probably have been unfair for him even to consider it.

16. In the circumstances of this case, therefore, the grounds of appeal and Mr Lindsey's submissions come nowhere near showing unfairness. His citation of Nwaigwe [2014] UKUT 00418 does not assist.

17. The Secretary of State was not at any stage deprived of the ability to show that it was not possible to obtain representation or to renew the application for adjournment on that or indeed any other ground. As she did not take advantage of that, there is no basis for saying that she was deprived of the right to a fair hearing.

18. Judge O'Rourke made no error of law and his decision stands.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 4 December 2020