The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: AA/00254/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On September 7, 2015	**On September 23, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MR J K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jaisri, Counsel, instructed by Kanaga Solicitors
For the Respondent: Miss Isherwood (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka. The appellant claimed to have entered the United Kingdom on October 2, 2013. He claimed asylum the same day and was served with form IS 151A as an illegal entrant. He attended an asylum interview on March 20, 2014 but his claim for asylum was refused on November 24, 2014 under paragraph 336 HC 395 and the same day a decision was taken to remove him by way of directions under paragraphs 8-10 of schedule 2 to the Immigration Act 1971.

2. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on January 7, 2015 arguing that if returned he was at risk or persecution.

3. The matter came before Judge of the First-tier Tribunal Woodcraft on April 20, 2015 and in a decision promulgated on April 29, 2015 he refused the appellant's claims for asylum, humanitarian claims and under article 8 ECHR.

4. The appellant lodged grounds of appeal on May 12, 2015 and on May 21, 2015 Designated Judge of the First-tier Tribunal McCarthy gave permission to appeal finding there were arguable grounds that the Tribunal had erred by refusing to adjourn the appeal when faced with the evidence presented to him.

5. The respondent filed a Rule 24 response and disputing any unfairness and submitted the Tribunal had been entitled to proceed without adjourning the hearing.

6. This case came before me on the above date and both parties were represented as set out above.

DISCUSSION AND FINDINGS

7. The Tribunal had refused an adjournment request in this matter and gave reasons for that decision in paragraphs [11] to [12] of its decision. The Tribunal noted:

   a. At 9.15am counsel as made aware by instructing solicitors that they had received a call from the appellant's friend who said the appellant was unwell yesterday with diarrhoea and sickness the previous day and was still unwell. The friend told the solicitors he was taking him to A and E.

   b. No one had actually spoken to the appellant on the day of the hearing.

   c. The case was put back in the list for thirty minutes for instructions to be obtained.

   d. The appellant's friend confirmed the appellant was still waiting at A and E and the staff were unwilling to confirm he was there.

   e. He considered an adjournment request and applied the test in Nwaigwe [2014] UKUT] 418 and found:

      i. No direct evidence why he had failed to attend court.

      ii. No one had spoken to the appellant personally.

      iii. No confirmation from the doctor that the appellant was actually there or had seen a doctor.

      iv. Concluded no reasonable excuse to adjourn.

8. The hearing proceeded by submissions only but after the hearing a solicitor's letter accompanied by evidence from the hospital and a copy of the prescribed medication slip was submitted. The Tribunal found the letter could not be relied on because it was neither on headed note paper

nor did it confirm the appellant was unwell to attend the hearing. The Tribunal concluded he had received "over the counter medication" and concluded the original decision to proceed was correct.

9. The grounds argued the solicitors had been in direct contact with the appellant contrary to the Tribunal's claim and no medical report was produced because he had not actually been seen by a doctor. Confirmation of the appellant's incapacity had been submitted and it was submitted the Tribunal had acted unfairly in refusing to adjourn the case.

10. Permission to appeal had been given because it was arguable the Tribunal's reasons for refusing the adjournment were "wholly inadequate" because:

    a. The Tribunal's comments on the notepaper was unsound because the style of the note was one commonly presented to the Tribunal.

    b. If the Tribunal had concerns about an absence of information, then it should have given the appellant an opportunity to address any concerns about the note and its content.

    c. The Tribunal failed to have regard to the appellant's history of attending hearings and the fact he was expected to attend by his counsel and there was telephone contact on the day between either him or his friend and the solicitors.

    d. It was peculiar the Tribunal did not accept the explanation given by counsel and solicitors.

11. Although a rule 24 response had been filed Miss Isherwood stated she had reviewed the evidence and concluded that there was a procedural error in this appeal.

12. In those circumstances I did not require Mr Jaisri to address me and I found there had been an error in law. As there had been no proper oral hearing I indicated to Mr Jaisri that I was minded to remit the matter back to the First-tier Tribunal. In doing so I had regard to Part 3, Section 7.1 to 7.3 of the Practice Statement.

13. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

> "Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
>
> The Upper Tribunal is likely on each such occasion to proceed to re-make 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 re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

14. In light of the Practice Direction whilst I had some concerns in remitting this matter back to the first Tier Tribunal due to the inherent delays existing in the jurisdiction at the present time I agreed to remit the matter.

15. It goes without saying that once that date has been fixed the appellant should serve on both the tribunal and the respondent an updated bundle of evidence that is to be relied on.

DECISION

16. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.

17. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

Signed: Dated:

Deputy Upper Tribunal Judge Alis