



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI 2023 000602
First-tier Tribunal No:
PA/02294/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 May 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

MS NAZIFE BRATA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brown, counsel, instructed by My UK Visas
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 3 May 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of Judge Sweet of the First-tier Tribunal (“the Judge”) promulgated on 8 February 2023, dismissing the Appellant’s appeal against the Respondent’s decision made on 19 December 2019 to refuse her claim for protection. The decision had followed a hearing before Judge Sweet on 6 February 2023 conducted online using the CVP video hearing system. The Appellant had not attended the hearing and the appeal concerns the fairness of the CVP hearing and the circumstances of the Appellant not participating.

Hybrid Hearing

2. At the request of the Appellant the hearing was conducted as a hybrid hearing. Mr Wain and we were present in the hearing room. Mr Brown and the Appellant

participated via Teams. We were satisfied that Mr Brown and the Appellant could fully participate in the hearing which was conducted by way of submissions only.

The Appellant's ground of appeal

3. The Appellant sought permission to appeal on the ground that she was deprived of a fair hearing. The matter was converted from an in-person hearing to a video hearing at the Tribunal's volition. The Appellant wished to participate in the hearing and to give oral evidence. A link to do so was faulty and she was unable to access the hearing. This was material to the outcome as the Judge drew an adverse inference from her purported failure to attend the hearing.

First-tier grant of permission to appeal

4. Permission to appeal was granted by Judge Hamilton of the First-tier Tribunal on 9 March 2023 noting that any recording of the hearing should be obtained and cautioning that the Judge's Decision made no reference to an application for adjournment being made, or objection to proceeding in the Appellant's absence, so that it may well be the case that the Judge was entitled to proceed as he did.
5. In fact it has not been possible to obtain any recording of the hearing.

The Respondent's response

6. There is no Rule 24 response. However, at the hearing Mr Wain submitted that while the principles of fairness referred to in *Nwaigwe adjournment(: fairness)* [2014] UKUT 00418 (IAC) should be applied, the Judge's decision showed that no adjournment application had been made.
7. While there was evidence of problems connecting to the hearing for the Appellant's representative, Mr Greer, provided by him in a Witness Statement it was not clear that any more time was requested by him for the Appellant to join
8. Furthermore, the circumstances overall needed to be taken into account. The Appellant had failed to comply with Tribunal directions.

Discussion

9. This appeal is purely concerned with the fairness of the hearing before Judge Sweet. *Nwaigwe* makes clear that in considering any procedural matters the test to be applied is not reasonableness but fairness.
10. We recognise in this case that the Appellant had failed to comply with directions issued by a judge to produce medical evidence within 8 weeks from 31 July 2020. There had then been a late application for adjournment less than 24 hours before the hearing, more than 18 months later, in which the Appellant's representatives said that the Appellant was awaiting the outcome of a psychiatric report commissioned in 2020 together with a further report

commissioned following consultations in September and November 2020. The adjournment application was also on the basis that the Appellant required a face-to-face hearing due to her language difficulties. The adjournment was refused by a tribunal caseworker on the basis of having been made so late, but the Appellant's representatives were invited to renew their application orally at the hearing before Judge Sweet.

11. The failure to comply with directions and the very late application for adjournment were clearly matters on which the Judge focused given his comments in his decision about not only about the Appellant's failure to attend the hearing, but also her failure to provide the directed medical evidence, as matters going to her credibility. However, as stated in *Nwaigwe* "...sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing..."
12. The Appellant has provided a Witness Statement from her previous counsel, Mr Greer, together with exhibited emails. He sets out in detail the problems he encountered in trying to obtain a working link to the video hearing. On seeking to join the hearing he received an error message telling him that his PIN was invalid. He informed the tribunal's administration the web link did not work and received an email response informing him that the PIN had changed. However, that PIN also did not work. He wrote to the administration to explain that the problem continued. A little less than an hour later he received a message telling him that the hearing was ready to start. He made several attempts to join the hearing and emailed again to say that the PIN numbers did not work. A third PIN was provided and after several attempts using the various numbers he accessed the video hearing room around 12:15pm. The Appellant was not present and Mr Greer excused himself in order to make contact. At 12:26 pm he returned to the video hearing, but the Appellant was still not present and the hearing continued in her absence.
13. Although the Judge said in his decision (at paragraph 9) that Counsel for the Appellant confirmed that the Appellant did not wish to seek an adjournment, but to proceed with the hearing itself, the Judge also stated (at paragraph 11) that Counsel submitted that the Appellant had not had a fair opportunity to attend the hearing. On their face the two statements appear to be potentially inconsistent, but we conclude that the reference to the Appellant not wishing to seek an adjournment related to the description in the previous paragraph of the invitation to refresh the application for an adjournment made the previous day, for the hearing before Judge Sweet to be adjourned until another day altogether.
14. However, in any event we are left with the statement made by the Judge that Counsel had submitted that the Appellant had not had a fair opportunity to attend the hearing. The Judge does not address this submission in any way in his decision. He does not address why it was concluded that it was fair to proceed by way of video hearing in the circumstances before him (rather than, for example, allowing more time for the Appellant to connect to the call, in light of the evident difficulties encountered by Mr Greer in his statement). He simply says nothing more after noting the submission.
15. Given the circumstances described in Mr Greer's Witness Statement and the lack of explanation by the Judge of why it was fair to proceed, we must conclude that there was an error of law. This conclusion is reinforced by the Judge stating that the Appellant's failure to attend counted against her credibility. On the basis of the Judge's decision as written by him the hearing was procedurally

unfair. It did not satisfy the requirements of fairness encapsulated in the overriding objective which must be respected in all cases.

16. Given the nature of the error of law, the appeal will need to be remitted for a rehearing de novo.

Notice of Decision

17. The making of the decision of the First-tier Tribunal involved the making of a procedural error which constituted an error of law. The decision is set aside.

18. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Sweet.

T. Bowler
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 15 May 2023