



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: AA/05383/2013

THE IMMIGRATION ACTS

**Heard at: Field House
On 1 October 2015**

**Decision and Reasons Promulgated
On 27 November 2015**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A H

ANONYMITY DIRECTION CONTINUED

Respondent

Representation

For the Appellant: Ms E Savage, Senior Home Office Presenting Officer

For the Respondent: Mr S Harding, counsel (instructed by A Seelhoff Solicitors)

DETERMINATION AND REASONS

1. I shall refer to the appellant as the "Secretary of State" and to the respondent as "the claimant".
2. The claimant is a national of Iran, born on 23 September 1981. His appeal against the decision of the respondent dated 28 May 2013 to remove him under s.47 of the 2002 Act following the refusal of his application for asylum was allowed by the First-tier Tribunal Judge in a determination promulgated on 1 July 2015.
3. In granting permission to appeal, First-tier Tribunal Judge R A Cox found that the grounds disclosed an arguable material error of law. He stated that through no-one's

fault, the date when the appeal was heard turned out to be a somewhat chaotic day from the point of view of listings, with the result that the Home Office Presenting Officer found herself servicing two courts.

4. It appears that there was also some failure of communication in that the Judge thought his options were either to adjourn or to proceed without a presenting officer, whereas the presenting officer was always willing and able to proceed, given time to complete her commitment in the other court room. It was contended that the Secretary of State was deprived of the opportunity of cross examining the claimant with regard to various discrepancies said to exist in his account. The appeal turned on the credibility.
5. Judge Cox emphasised in granting permission, that this was not to criticise the Judge who acted according to his understanding of the position at the time and also took advice from a Designated Judge, but rather a recognition of the need for fairness for both sides and of the fact that the secretary of state had wanted and had arranged to be represented at the hearing, but the presenting officer, who was in fact fully prepared, was prevented from doing so by the Tribunal's own administrative problems on the day.
6. In his determination, the Judge noted that the case came before him as a "float". The assigned presenting officer had another asylum case to present in a different court. It became apparent that for another presenting officer to "read themselves into the case" could take a considerable time [19]. This is a case that had been adjourned before. He considered that in the interests of justice the matter should be dealt with speedily. He notified the senior Duty Judge, indicating that he wished to deal with the case in the absence of a presenting officer because of the logistical problems that had been created, through no fault of the presenting officer. It was agreed that he should proceed with the hearing in the circumstances.
7. The presenting officer concerned has subsequently provided a "response statement" to the claimant's solicitor's assertion dated 4 September 2015. The Rule 24 response opposed the grounds of appeal.
8. It is asserted in the statement that what took place that day differed significantly from the account put forward by the presenting officer who was supposed to present the matter before the First-tier Tribunal.
9. In the grounds seeking permission to appeal, the presenting officer was said to have insisted that she wished to present the case, and it was requested that the Judge accordingly wait until she was available before proceeding. She also produced what she referred to as a contemporaneous hearing minute, setting out the chronology.
10. In that note, prepared on 23 June 2015, the date of the hearing, she set out 'the confusion' that arose in Court between her list and the usher's. There was confusion as to whether the claimant's case was actually being heard or not. She stated that they were all confused. In due course, the usher spoke to the manager to resolve the matter.

11. The presenting officer was informed that the claimant's case was going ahead. She discovered that another Judge was not coming in, so that they had decided to float the cases to available Judges. There were then clashes with start times and the two Judges who were to hear her cases. When the usher attempted to coordinate these times, she returned and told the presenting officer that the Judge had begun the claimant's asylum appeal and had made a judicial decision for the case to go on without a presenting officer.
12. She stated that she strongly objected and asked the usher to let the Judge know that she has been in Court since 9 am and was "very ready to go." She did not have the claimant's bundle before her but has used the time effectively to read the "reps" bundle so that there would be no further delays.
13. She was then informed that the Judge had decided that it would go on without a presenting officer. Rather than creating a scene, she decided to present another case before another Judge.
14. As part of the Rule 24 response, a witness statement was provided from counsel, who represented the claimant at the hearing. This is dated 31 July 2015. The Rule 24 response was received by the Tribunal on 8 September 2015.
15. In her witness statement, she asserts that it is not correct that the presenting officer was "fully prepared" to conduct the appeal. She had told counsel that she did not have a file, or the appellant's bundle. She had received the refusal letter and asylum interview record that morning. She states that the presenting officer became "visibly irritated" stating that it would be for the Judge to come to a view on whether or not she could proceed on the day. At that point, neither knew whether the case would ultimately be floated out of that court. She offered the bundles to the presenting officer, who remained reading them in court.
16. Counsel also notes that according to her note and her recollection, the presenting officer "did actually state that she was happy for the case to proceed in her absence." She said to counsel in front of the instructing solicitor's interpreter that she would not manage to prepare the claimant's appeal in the time given that she was now dealing with a second asylum appeal, and that the case would have to go ahead without her.
17. When they were called into Court, the Judge stated that the appeal would proceed and there was no presenting officer ready to present the appeal, and he would not consent to an adjournment. The Judge stated that waiting for a presenting officer to become available after the other asylum appeal had been concluded could lead to a further adjournment. That accords with her contemporaneous note of the hearing which she has submitted.
18. The Rule 24 response to which I have referred elicited a strong rebuttal, dated 30 September 2015, from the presenting officer concerned. In particular, she denies that she had at any stage indicated through the usher that she was happy for the case to proceed in her absence. She at no point said this to the usher. Nor did she ask for this message to be conveyed to the Judge. Whilst she was in the presenting officer's room where she had been reading, the usher told her that the case was going to be heard by the Judge. She assumed that she was being called to attend the hearing, but was told that "a judicial decision" had been made.

19. She strongly objected to the usher explaining that she could not present this case as it is a priority case and it could not go on without a representative. Furthermore, she states that she had fully prepared the case and had finished 'prepping' the claimant's bundle to include the objective material. There was no-one else apart from herself and the usher who was present at the time.
20. In fact, she instructed the usher to go and tell the Judge that she was ready to present the case and that " ... I **must** present the case that day." She insisted that the usher tell the Judge the specifics so he could understand. She had been in court since 9 am and was prepared and ready to present. Each time the usher returned with a message, she insisted that she had to present the case.
21. Given the decision that had been made, she went to the other court to present an Article 8 case, and mentioned her concern to the Judge in that court.
22. In a fax sent to the Upper Tribunal on 30 September 2015, Ms Savage, as the presenting officer, requested an adjournment of the hearing as scheduled the following day, i.e. on 1 October 2015.
23. In the light of the Rule 24 response, she declared that the Secretary of State intends to call the presenting officer to give evidence. However, as she was not available to attend the Tribunal "tomorrow", the Secretary of State requested an adjournment to enable her to give evidence.
24. In their letter dated 4 September 2015 to the Tribunal, the claimant's solicitors had also stated at paragraph 3 that they proposed to call as witnesses on the day of any permission hearing, both counsel and an interpreter. It was also requested that the presenting officer be called if the Secretary of State continued to maintain her position regarding the appeal.
25. From the above, it is clearly evident therefore that there is a very substantial conflict between the accounts given by the presenting officer and counsel who represented the claimant before the First-tier Tribunal.
26. Ms Savage pursued her application at the outset of the hearing on 1 October, that the appeal be adjourned in order to enable the presenting officer to give evidence. Mr Harding on behalf of the claimant submitted that the secretary of state had had ample time to ensure her availability. No proper arrangements had been made to ensure her presence. In the circumstances, he objected to the adjournment sought.
27. I stood the appeal down for a short period and considered the competing assertions in the statements.
28. I gave an extempore decision on return as set out below.
29. I had considered the request for an adjournment but had decided that it would not be appropriate in this case to conduct what amounted to a "trial within a trial" in order to resolve what took place on 23 June 2015 before the First-tier Tribunal.
30. In any event, I would not, on the basis of the competing statements, have come to a conclusion that either deponent had in any way been dishonest. Having stood back

and considered the documentation as a whole, including the problems identified at the hearing centre on 23 June 2015, there was room for genuine misunderstanding.

31. I noted that if the shoe were on the other foot, and the claimant's counsel had been double booked in another court resulting in the case being presented in the representative's absence, the subsequent dismissal of his appeal would give rise to a genuine perception of injustice.
32. In this case the Secretary of State has not had the opportunity of being heard arising from the circumstances that day. I have no reason to suppose that the presenting officer's assertion that she was ready and prepared to present the respondent's case that day is anything other than genuine.
33. In the circumstances, the same perception of injustice arises in this case. Moreover, it is in the public interest that the case for the Home Secretary be advanced and that the claimant's version of events be tested. The appeal, I was informed, turned on the question of credibility.
34. I therefore found for the reasons referred to that, through no fault of the First-tier Tribunal Judge, there has been a procedural irregularity.
35. In the circumstances, I set aside the decision of the First-tier Tribunal. I have had regard to the Senior President's guidelines and find that this is an appropriate case for the appeal to be remitted. The secretary of state has not had a proper opportunity of having her case fully considered.
36. I accordingly directed that the case be remitted to the First-tier Tribunal (Taylor House). A complete re-hearing will take place requiring substantial fact finding.

Decision

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made before another Judge. The date arranged is 2 December 2015.

Anonymity direction continued.

Signed

Date 7 October 2015

Judge C R Mailer
Deputy Upper Tribunal Judge