



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/17136/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7 April 2015**

**Decision & Reasons
Promulgated
On 30 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MUHAMMAD ABBASI ABBASI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs (Counsel instructed by Mayfair Solicitors)

For the Respondent: Mr S Walker (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. In a decision promulgated on 11 December 2014, First-tier Tribunal Judge Mayall (“the judge”) dismissed the appellant’s appeal against a decision to remove him from the United Kingdom.
2. In the course of the hearing before the judge, the Secretary of State’s representative produced first one and then a second document from his

own file, neither having been disclosed to the appellant or his representatives beforehand. The decision contains no detailed description of either document. So far as the first is concerned, the appellant's Counsel took instructions, the judge having adjourned for a short while, and she returned to the hearing room and indicated that she was prepared to continue. Following production of the second document, Counsel raised an objection. The judge allowed a further short adjournment. When the appellant's Counsel returned, she applied for an adjournment of the appeal. The Presenting Officer objected to the application, submitting that the appellant had been fully aware of events on 30 November 2013, when he was stopped by the police and apparently questioned. He pointed out that the appellant's bundle had been received only immediately before the hearing.

3. The judge refused to adjourn to another date but allowed an adjournment from the late morning until 2:00pm, so that full instructions could be taken. At this point, Counsel told him that she would withdraw from the case. She told the judge that she felt unable to take a statement as the appellant could not speak English properly. The judge indicated that no witness statement would be required and the appellant could give oral evidence.
4. Cross-examination by the Presenting Officer resumed at 2:00pm. There was no re-examination. The judge asked one or two questions by way of clarification. The appellant's Counsel then informed the judge that the appellant's sister, who had intended to give evidence and who had been present earlier, had returned to her home because her child was ill. The judge recorded a submission from Counsel that there had been unfairness as the appellant had been presented with documents in English without any notice.
5. An application for permission to appeal was made on the single ground that the appellant was deprived of a fair hearing as a result of the refusal to adjourn in the light of the very late adduction of documentary evidence by the respondent. The documents related to alleged admissions made by the appellant to a police officer. Copies were not provided to the appellant's Counsel and were not served after the hearing. Guidance was given recently by the Upper Tribunal in Nwaigwe [2014] UKUT 418 and the refusal to adjourn led to a failure to afford the appellant a minimum entitlement that he should know the case against him. The appellant was unable to give effective instructions as he was not able to read English and did not have the benefit of an interpreter to translate the documents and assist Counsel. The very late adduction deprived him of the opportunity of considering the documents in advance of the hearing, so that he might take proper advice. He may have been aware of an allegation put to him in cross-examination, that he had told police officers that he worked full-time as a builder, in contradiction of his case that he was a full-time carer who gave assistance to his sister, but this did not reduce the unfairness caused when documents in support of the respondent's position were

relied upon without notice or proper disclosure. It was clear from the decision that the judge formed an adverse view of the appellant's credibility, informed by the documents put to him for the first time in cross-examination.

6. In a rule 24 response, the Secretary of State opposed the appeal and submitted that the judge directed himself appropriately. There was late production of documents on both sides and the judge gave ample time to the appellant and his Counsel to discuss the issues. The document (it is not clear from the grounds which one the author had in mind here) was confirmed by the appellant as having been signed by him. He denied that he had ever worked as a builder or told police officers this. If the matter were to be reheard, the result would be the same. Refusing an adjournment did not cause unfairness.

Submissions on error of law

7. Mr Biggs said that the documents put to the appellant in cross-examination were not disclosed, as they should have been. Unfairness had been the result.
8. In seeking to identify which documents were produced by the Presenting Officer in the course of the hearing, Mr Walker identified from his file a detention review summary and a booklet (it appeared to be blue in colour) recording action by a police officer at the time the appellant was stopped in November 2013. The detention review summary was passed to Mr Biggs. He said that the document referred to by the judge might have been the original notebook. The item he had been passed by Mr Walker consisted of one page from a total of four.
9. Mr Biggs said that the appellant had not received a fair hearing. He might have obtained a witness summons to secure the attendance of the maker of the documents produced in the course of the hearing by the Presenting Officer. He was deprived of such an opportunity by the judge's decision to refuse an adjournment. The appellant could not read or write English, a fact which was admitted by the Secretary of State and used against him. He gave evidence with the assistance of an Urdu interpreter supplied by the Tribunal. This person was clearly not available to assist with taking instructions on the written documents produced by the Presenting Officer. The appellant was unable to consider those documents or give instructions himself. It was no answer that the gravamen of the complaint was known in advance. It was one thing to know an allegation but quite another to know the evidence sought to be relied upon in relation to it. This was all the more so where the evidence was in documentary form. Again, the appellant was deprived of steps he might have taken to challenge the documents, including seeking a witness summons so that the maker could give evidence which might be tested.

10. The judge correctly pointed out that the appellant's bundle was produced on the morning of the hearing but it was apparent that the respondent had possession of it and there was no suggestion anywhere that late production gave rise to any prejudice. It was irrelevant to the application for an adjournment, which was based on the prejudice to the appellant caused by the failure to serve the documentary evidence in any reasonable time. Reliance was placed upon guidance given recently by the President in Nwaigwe.
11. The specific evidence was not disclosed in advance and the appellant could not consider what the documents contained or give proper instructions. If an interpreter had been present to give him assistance, this might have weakened his case but, in fact, no interpreter was available and his solicitors had no reason to suppose that the Presenting Officer would produce the items from his own file, in the course of the hearing.
12. Moreover, the reasons given by the judge for refusing the application for an adjournment were inadequate. Paragraphs 18 and 19 of the decision were relevant here. There was no recognition of the prejudice caused to the appellant, notwithstanding the short adjournments the judge in fact gave on the day. The appellant's inability to read English, relied upon in submissions by the Presenting Officer, was not properly taken into account. At paragraph 43, in relation to section 117 of the 2002 Act, the judge appeared to accept that the appellant could not speak English.
13. Mr Walker said that it was clear from paragraph 38 of the decision that one of the documents produced by the Presenting Officer was known to the appellant, at least in substance. The Pre-Action Protocol letter preceding his judicial review showed this. This aspect was not a surprise to the appellant. The judge gave his Counsel over two hours to take instructions, so that the appellant could deal with the point. This was ample time to consider the documents. The appellant must have been aware of the contents of them in the light of his Pre-Action Protocol letter. Although it was not entirely clear whether evidence was taken from the appellant in English or through an interpreter, the judge's conclusions were open to him.
14. In a short reply, Mr Biggs said that it was not clear from the decision what the documents in issue were. Mere mention of them, for example at paragraph 16, was insufficient. One might speculate that the document referred to in that particular paragraph was the blue notebook but even this was not clear from the decision. The reference to a bundle in paragraph 16 probably referred to the appellant's bundle.

Conclusion on error of law

15. The Presenting Officer's action in producing first one and then a second document in the course of cross-examination, to undermine the

appellant's case that he was a full-time carer and to add support to the Secretary of State's case that he told the police in November 2013 that he was, on the contrary, in full-time employment as a builder, is very difficult to reconcile with the overriding objective and the duty of the parties to assist the Tribunal, contained in rule 2 of the Tribunal Procedure Rules 2014. The Presenting Officer felt able to draw attention to service of the appellant's bundle only on the morning of the hearing, albeit before the hearing began, and there was clearly ample opportunity at that point for him to disclose documentary evidence relevant to the issues. The decision does not contain a precise description of the documents produced in the course of cross-examination but it appears that one of them was a blue notebook completed by a police officer following an encounter with the appellant in November 2013. Paragraph 39 of the Secretary of State's decision letter records that the appellant apparently claimed to be in work as a builder and so it should have been perfectly clear to the Presenting Officer that this was part of the Secretary of State's case. As such, the contents of the notebook and any document bearing on the matters in issue between the parties ought to have been disclosed at the first opportunity.

16. There clearly was no compliance with standard Case Management Directions sent out with the notice of hearing. The Presenting Officer was, nonetheless, in a position on the morning of the hearing, having received the appellant's bundle, to take a sensible view regarding relevant documentary evidence in his possession. It was no adequate answer to point to late service of the appellant's bundle, to deflect attention from the respondent's own failure.
17. The critical question is, of course, whether the short adjournment given by the judge was sufficient to meet the requirements of fairness and the overriding objective. If it were the case that Counsel had sufficient opportunity to take full instructions on the documentary evidence produced in the course of cross-examination, an adjournment of two hours might well have been sufficient. In the particular circumstances of this appeal, however, I conclude that more was required. The appellant's evidence was given through an Urdu interpreter whose duty was to the Tribunal. The decision records that Counsel expressly stated that she was unable to take full instructions (at paragraphs 20 and 33). The decision also shows that the judge carefully recorded the appellant's denial that he had worked as a builder and his denial that he had told the police any such thing. That denial was, by reason of the refusal to grant an adjournment, wholly unsupported by evidence which might otherwise have been available from the maker of the documents produced by the Presenting Officer. As Mr Biggs submitted, an adjournment would have enabled the appellant to take proper advice, through an interpreter, on the merits, if any, of a witness summons to secure the attendance of the police officer or other author of the documents. The judge went on to make adverse credibility findings which took into account the appellant's denial of matters relied upon by the Secretary of State but in the absence of any

considered response from the appellant that might have been identified following a consultation with Counsel, assisted by an interpreter.

18. In these circumstances, I conclude that the refusal to grant an adjournment to another day resulted in procedural unfairness, such that the decision of the First-tier Tribunal must be set aside and remade.
19. Both representatives suggested, in the light of paragraph 7.2 of the Senior President's Practice Statement and taking into account also paragraph 2150 of the current edition of Macdonald, that the appropriate venue for remaking the decision would be the First-tier Tribunal at Hatton Cross, before a judge other than Judge Mayall. I agree with that suggestion. Mr Biggs raised the question of costs incurred in the Upper Tribunal, by reason of the Secretary of State's unreasonable conduct in the course of the First-tier Tribunal hearing.
20. Fairness requires that the potential payer of costs must be given an opportunity to make representations. It was clear that Mr Walker was not in a position to make representations, without an opportunity to take full instructions from the case owner and, perhaps, from the Presenting Officer with conduct of the appeal before the judge. It seemed to me that it would be appropriate for the application to be made at the conclusion of the First-tier Tribunal hearing as findings of fact made on that occasion might well be relevant to the costs assessment. Mr Biggs suggested that the application ought to be made to the Upper Tribunal at the conclusion of the First-tier Tribunal hearing, as in issue were the costs incurred in the error of law hearing. I agreed to include a direction that an application should be made to the Upper Tribunal in relation to costs. Directions are attached to this short decision.

NOTICE OF DECISION

21. The decision of the First-tier Tribunal is set aside. It will be re-made in the First-tier Tribunal at Hatton Cross, before a judge other than First-tier Tribunal Judge Mayall.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

There has been no application for anonymity and I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

**Upper Tribunal
(Immigration and Asylum Chamber)**

THE IMMIGRATION ACTS

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MUHAMMAD ABBASI ABBASI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DIRECTIONS

1. The decision of the First-tier Tribunal is set aside and will be re-made at Hatton Cross before a judge other than First-tier Tribunal Judge Mayall.
2. To assist the First-tier Tribunal, the Upper Tribunal directs that:
 - (a) the respondent shall make copies of and file and serve the documents in her possession made on the occasion of the appellant's arrest by police officers in November 2013 (to include the notebook recording the appellant's answers to questions) and
 - (b) the appellant shall file and serve copies of the statement of case and supporting documents in the appellant's judicial review proceedings in early 2014.
3. The documents set out above shall be filed and served no later than 10 working days before the hearing in the First-tier Tribunal.
4. The appellant has permission to apply to the Upper Tribunal for an order for costs under rule 10(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008, within 14 days of promulgation of the remade decision by the First-tier Tribunal, the application to be listed before Deputy Upper Tribunal R C Campbell if he is available, with a time estimate of 1.5 hours.

Signed:

Date:

Deputy Upper Tribunal Judge R C Campbell