



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

Appeal Number: AA/04474/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 26th January 2016**

**Decision & Reasons Promulgated
On 3rd February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Z K

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Ms Brocklesby-Weller, Home Office Presenting Officer
For the Appellant: Mr Lemer, Counsel.

DECISION AND REASONS

1. The Secretary of State pursues this appeal against the decision of the First-Tier Tribunal to allow an appeal against the refusal of asylum.
2. I maintain the descriptions of the parties as they were in the First-Tier Tribunal, for ease of reference.
3. The appellant is a citizen of Afghanistan who appealed against the decision to refuse his asylum claim. His appeal against that refusal was allowed by Judge of the First-tier Tribunal Ripley ("the FTTJ") in a decision promulgated on 30 October 2015.

4. I maintain the anonymity direction which was made in the First-tier Tribunal.
5. Permission to appeal was granted by Upper Tribunal Judge Grant-Hutchison on 20 November 2015 in the following terms:

“It is submitted that the Home Office Presenting Officer who had heard all the evidence was unable to attend the resumed hearing to give submissions due to illness and another Home Office Presenting Officer who attended to request an adjournment in the circumstances was refused [sic]. As a result he could only make submissions based on the Reasons for Refusal Letter. There is no record of the adjournment request in the Decision & Reasons and the reasons why the request was refused [sic]. It is an arguable error of law that had the Home Office Presenting Officer been able to attend, the points raised in submissions may have made a material difference to the outcome or to the fairness of proceedings.”
6. Thus the appeal came before me today.
7. In support of their position, the appellant and respondent produced the following:
 - (i) A typed minute dated 27 October 2015 and said to be signed by Michael Sartorius, POU Feltham (albeit it is not actually signed).
 - (ii) Two witness statements by Victoria Idia-Aina, caseworker at Howe & Co, Solicitors, who represent the appellant.
8. The respondent’s grounds of appeal are based on Mr Sartorius’ minute which states as follows:

“The Presenting officer responsible for the conduct of this appeal was ill on the day of the hearing. A request was made for the hearing to be adjourned to a time when the PO was well enough to attend due to all evidence being completed and only submissions based on the evidence heard remained [sic] this was refused but I have no doubt if the illness had been to a Representative [sic] then the adjournment on the same basis would have been granted. I pointed out that I would be unable to assist the Tribunal further than relying on the RFRL as I was not privy to the evidence heard and no attempt was made by the Tribunal or the Representatives to inform me of the nature of the evidence or be provided with an agreed record of proceeding for comment. Should the appeal be allowed then the decision should be challenged accordingly.”
9. The grounds of appeal to this Tribunal state that Mr Sartorius had sought an adjournment and that this “was apparently refused and he had to make submissions solely on the Reasons for Refusal letter in this case:”. The grounds note that “the FTTJ nowhere records that such an adjournment request was made and refused, and as a result the determination is flawed for procedural irregularity”. It is suggested that the respondent’s representative had not been treated equitably and the “Judge’s findings and reasons overall do not reflect that a fair hearing took place”.
10. In summary, the evidence of the appellant’s caseworker is that no such adjournment was requested, albeit the absence of the previous HOPO was discussed by the FTTJ with Mr Sartorius at the resumed hearing.
11. Ms Brocklesby-Weller accepted that there were differences between Mr Sartorius’ version of events at the hearing and that of the appellant’s representative. However, she submitted that Mr Sartorius’ minute was consistent with paragraph 16 of the FTTJ’s decision which refers to

his making submissions in reliance on the reasons for refusal letter. She submitted that the respondent had been prejudiced by the inability of the second HOPO to make oral submissions on the appellant's credibility. She accepted that the first HOPO had made notes of the oral evidence but said these were not particularly legible and, in any event, it was not clear why they had not been passed to the second HOPO. She submitted that the tribunal's decision might have been different if credibility points had been raised in submissions. She accepted that the FTTJ refers at paragraph 25 to taking into account the cross-examination but suggested that the FTTJ may not have been alive to the issues at the forefront of the first HOPO's mind on the issue of credibility. She concluded by saying that the case had not been put as the respondent wanted.

12. Mr Lemer, for the appellant, relied on the statement of Ms Idia-Aina to the effect that Mr Sartorius had made no application for an adjournment at the resumed hearing. There had been a "very brief discussion between the HOPO and the Immigration Judge about the change of Presenting Officer for the hearing on 30 October 2015, and the HOPO explained that his colleague was ill. However, at no point did the HOPO ask the Immigration Judge to adjourn the case nor did he make any submissions for an adjournment...". He submits that, in any event, any error of law was not material: there were three key aspects of the appellant's account and findings on these had been made by the FTTJ by reference to corroborative documentary evidence rather than the appellant's oral evidence alone. Thus any oral submissions for the respondent on the appellant's credibility arising out of his oral evidence would have had no material impact on the outcome of the appeal.

Discussion and findings

13. The respondent's appeal to this tribunal is based solely on the minute produced by Mr Sartorius. I have some concerns about that minute. First, it is not signed. Secondly, it is dated a week after the hearing attended by Mr Sartorius. Thirdly, it is vague, ambiguous and lacks detail. For example, whilst Mr Sartorius says "a request was made for the hearing to be adjourned to a time when the PO was well enough to attend" he does not state who made the request, when it was made or to whom or the reason an adjournment was requested. Whilst it could be inferred that it was made at the hearing to the FTTJ, it does not say this. No explanation is given for his not having the previous HOPO's record of the oral evidence. He appears to blame the tribunal and/or the appellant's representative for failing to provide him with it, yet there is no evidence he had asked for this from either.
14. Mr Sartorius claims that he pointed out that he would be unable to assist the Tribunal further than relying on the RFRL as he was not privy to the evidence heard. This accords with the decision of the FTTJ who states at paragraph 16:

"Mr Sartorius attended to make submissions for the respondent. He relied on the reasons given in the RFRL and the issues concerning credibility generally that had arisen in oral evidence".
15. There is no reference in the FTTJ's otherwise detailed and comprehensive decision and reasons to any request by Mr Sartorius for an adjournment. Thus the FTTJ's decision is consistent with the evidence of Ms Idia-Aina, who represented the appellant at the hearing, that "At the submissions only hearing on 30 October 2015 the HOPO did not make any request for an adjournment." Ms Idia-Aina's recollection (which is supported by a statement of truth) is that "there was a very brief discussion between the HOPO and the Immigration Judge about the change of Presenting Officer for the hearing..." She states, with some certainty, that "at no point did the HOPO ask the Immigration Judge to adjourn the case nor did he make any submissions for an adjournment under the [Procedure Rules]".

16. Given the appellant's caseworker's unequivocal statement, the depth and detail of the FTTJ's decision and reasons on all other pertinent issues, the poor quality of Mr Sartorius' note and the lack of any other supporting evidence (it was open to the respondent to ask for a copy of the FTTJ's record of proceedings, for example), I am unable to find that Mr Sartorius asked the FTTJ to adjourn the hearing to enable the previous HOPO to make oral submissions for the respondent on issues arising out of cross-examination. I find that this was an issue which was discussed between Mr Sartorius and the FTTJ but that that discussion did not amount to a request for an adjournment. Nor do I find that the FTTJ should have considered whether to adjourn the hearing of her own motion given the absence of the first HOPO. Mr Sartorius had rightly drawn her attention to the potential issues arising from the absence of the first HOPO and relevant issues of procedural fairness; the FTTJ was in a position to take account of those issues by reference to her record of the oral evidence. She was on notice of the fact that the first HOPO was not available to make such submissions and she would be able to take this into account when she made her decision, to ensure fairness to both parties. Indeed, in the event, this she did. Thus I find that the failure of the FTTJ to adjourn the resumed hearing was not procedurally unfair.
17. Even if a request for an adjournment had been made and refused, I am unable to find that that refusal was procedurally unfair. I specifically invited Ms Brocklesby-Weller to make submissions on the issue of materiality, there being no reference to this in the grounds of appeal. With all due respect to her, she was unable to point to any potential materiality because she had only the barely legible notes of the first HOPO and the typed note of Mr Sartorius to form the basis of any such submissions. She was unable to identify any issues which arose in the oral evidence and to which reference might have been made by the first HOPO had she made oral submissions.
18. I also bear in mind the following:
- (i) At paragraph 25 the FTTJ refers to having considered the respondent's reasons for rejecting the appellant's credibility both in the RFRL and "in the issues that came up in cross examination".
 - (ii) At paragraph 29, the FTTJ relies on the "abundance of character references and certificates" to find that the appellant "had a significant profile and responsibility".
 - (iii) The FTTJ found, at paragraph 31, contrary to the respondent's argument, that the appellant had exhaustively sought to avail himself of local protection. She noted his detailed account of his requests for protection and the "numerous letters" which corroborated his evidence. She further states "these letters also serve to evidence the threats he received". She refers specifically to other correspondence to which she gives evidential weight. She identifies the content of these letters as being "consistent with the appellant's account and they refer to the appellant's post and duties for which I have separate corroboration. There is nothing in the format of the letters that suggests they are not reliable. That is the view of Mr Zadeh who comments that they have the hallmarks of genuine Afghan documents". She found the documents were genuine.
 - (iv) As regards the reliability of the letters from the Taliban, the FTTJ accepted that these were brought to the UK by the friend of the appellant's father. She noted that the respondent disputed their veracity because they were not corroborated. However, the FTTJ noted the background "evidence" confirms that the Taliban do distribute 'night letters'. She also noted the comments of Mr Zadeh in this regard and concluded that "the appellant gave a consistent account of these letters in interview and in his statement". She did not refer to any oral evidence given by the appellant on these

matters and thus any oral submissions by the respondent on credibility would not have been of relevance to her findings with regard to the Taliban's letters.

- (v) The FTTJ concludes that the appellant is a credible witness who has given a detailed consistent account in his evidence, including his interview and his appeal statement.
19. Thus it cannot be said that the FTTJ's decision was based wholly or even largely on the oral evidence of the appellant. The FTTJ's decision demonstrates a level of scrutiny, analysis and thoroughness in the assessment of all the evidence by the FTTJ, including that given orally. The respondent does not suggest that the FTTJ's record of the appellant's oral evidence (paragraphs 8-14) is incorrect in any way. The decision refers specifically to the FTTJ having taken into account those issues of relevance arising in cross-examination. It is clear, taking the decision and reasons as a whole, that the FTTJ considered all the evidence and background material carefully and took it into account in her decision-making at every stage. I find it particularly telling that the respondent has been unable to draw my attention to any aspects of the cross-examination which have not been considered by the FTTJ in her decision. This suggests that the decision has been made with the relevant issues, evidence and background material in mind.
20. For these reasons, even if the HOPO made an application for an adjournment and it was refused and/or the FTTJ should have considered adjourning of her own motion and had decided against it, the failure to adjourn would not have amounted to an error of law capable of affecting the outcome of the appeal. Even if the first HOPO, who was unable to attend the resumed hearing, had made oral submissions, the FTTJ's decision would have been the same.

Decision

21. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.
22. I do not set aside the decision.

Signed **A M Black** Date 1 February 2016

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14, Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed **A M Black** Date 1 February 2016

Deputy Upper Tribunal Judge A M Black