



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/05119/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2016
Extempore judgment

Decision & Reasons Promulgated
On 2 June 2016

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MISS NIRANJINI SABARATHNAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandegani instructed by Wimbledon Solicitors
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The determination under challenge is a decision by First-tier Tribunal Judge Dean Kershaw promulgated on 27 November 2015 following a hearing at Sheldon Court in Birmingham on 13 November 2015. The appellant was represented at that hearing by Mr McWatters of Counsel instructed by HK Solicitors and the Secretary of State by Mr Petryszyn a Home Office Presenting Officer. The judge's decision runs to some 87 paragraphs, the final paragraphs of which conclude that the application for asylum is dismissed, the appeal under the Rules is dismissed and no anonymity direction has been made.

2. The appellant sought to challenge the judge's decision on the three grounds set out in the application for permission to appeal dated 7 December 2015 drafted by Mr Habib Ullah Khan of HK Solicitors.
3. Permission to appeal was granted by First-tier Tribunal Judge Holmes on 18 December 2015 for the reasons set out in paragraphs 3 and 4 of his grant of permission. In paragraph 3 Judge Holmes refers to the grounds as drafted in the following terms:
 - "3. The grounds as drafted assert either that the judge failed to correctly record the basis upon which Counsel was instructed to make an application for the adjournment of the hearing in order to obtain expert medical evidence upon the injuries she claims to have suffered in Sri Lanka, and the scars the appellant had claimed were visible upon her body, or, that Counsel mistakenly conveyed false information to the judge in the course of making that application. Either way the grounds raise the issue of whether the appellant received a fair hearing of her appeal; **Nwaigwe [2014] UKUT 418**.
 4. It will be for the appellant to make out her case of unfairness before the Upper Tribunal and this will in turn require a consideration on her part of whether she should waive legal privilege in relation to her instructions concerning the application for an adjournment. She will need separate advice on that. It will also require consideration on the part of her current solicitor, and on the part of Counsel who appeared on her behalf before the judge, as to whether they can properly continue to represent her if they are to be witnesses of fact as to the detailed instructions given to, and received by, Counsel, and the information that was then conveyed by Counsel to the judge; **BW (Witness statements by advocates) Afghanistan [2014] UKUT 568**."
4. The matter originally came before me on 8 April 2016 when Mr Bandegani appeared on behalf of the appellant. Wimbledon Solicitors were now the instructed solicitors on behalf of the appellant. The Solicitors Regulatory Authority had intervened into HK Solicitors on 4 April 2016 and Mr Bandegani was without the papers required to properly represent his client, as indeed were Wimbledon Solicitors. The matter was therefore adjourned to today's date with appropriate directions. One such direction was that the appellant was to file and serve an indexed and paginated bundle containing all the documents she intended to rely upon no later than 4pm, 6 May 2016. That time limit was breached, the documents arriving after the date, but I have allowed them in without consultation with the Secretary of State's representative as the information within the bundle contains matters of particular relevance to the issues under consideration today, in particular the signed witness statement of Mr McWatters which was attached to a supplementary bundle filed on 12 May and received at Field House together with what is described as an amended report of the medical expert Mr Martin.

5. It is important in relation to this matter that we take stock of the chronology of the First-tier Tribunal proceedings. The matter first came before a Judge of the First-tier Tribunal, Judge Pirotta, at a Case Management Review hearing at Sheldon Court in Birmingham on 10 June 2015. Judge Pirotta records in the Record of Proceedings that she was advised by Counsel who appeared on behalf of the appellant on that occasion that the representatives were awaiting reports that could be late, but they could proceed anyway as no date was known for the reports to be made available. Judge Pirotta issued standard directions, one of which was for all medical evidence to be filed at least five days before the full hearing, including full copies of all medical reports upon which the appellant was seeking to rely being sent to the Tribunal and the other party. The matter had been listed for a substantive hearing on Wednesday 24 June 2015 so, although the timescale was a little tight, it did provide ample opportunity for the solicitors to obtain the medical reports they were still waiting for.
6. On 24 June 2015 the matter came before First-tier Tribunal Judge Boylan-Kemp. On that occasion the judge was advised that a psychiatric report was awaited that it was hoped would be available within a relatively short period of time. The judge was instructed that the psychiatric assessment had occurred on 22 May 2015. Judge Boylan-Kemp acceded to the request and adjourned the hearing to a later date. The First-tier Tribunal file then shows that on 6 November 2015 a letter was received at Sheldon Court in Birmingham having attached to it an application to adjourn the substantive hearing scheduled for Friday 13 November 2015. This application is extremely detailed and was prepared by Grace Capel of Garden Court Chambers and is dated 6 November 2015. In relation to the medical report, the report of Dr Morrison the consultant psychiatrist is stated to have been prepared but needs to be finalised and that on the advice of Counsel, additional information had been sought from Dr Morrison who had not confirmed whether he was able to respond by 13 November 2015. In relation to the scarring report, the application for an adjournment suggested that the appellant could not proceed fairly with the hearing in the absence of an Istanbul Protocol compliant legal-medico report evaluating the consistency of the appellant's scarring with her account of detention and torture by the Sri Lankan authorities. There is also reference in this document to witness statements from the appellant's sister in the United Kingdom and mother and sister who reside in Colombo. The application does not indicate whether any scarring report had in fact even been sought.
7. On 11 November 2015 the application was refused by Designated First-tier Tribunal Judge McCarthy currently acting as the Resident Judge at Sheldon Court for the following reasons:

“The appellant requests a further adjournment in order to obtain a medico-legal report, for additional information to be provided by a psychiatrist and to obtain evidence from the appellant's sister who is resident in the UK and from her mother and another sister who reside in Sri Lanka. The request is refused because there is no explanation why these matters have not been raised or dealt

with sooner particularly given the previous case management and other directions.

8. The matter was not adjourned and remained listed before Judge Kershaw on 13 November, as stated. The judge records in the determination, between paragraphs 34 and 43 inclusive, the matters that were raised before him as a preliminary issue. The judge records the following:

“34. At the hearing I asked Mr McWatters if he was intending to make an application to adjourn the proceedings. I asked this as I had noted on the file that there had been a previous request by the solicitors to seek an adjournment and there was a written application in the bundle. The written application was considered by the acting Resident Judge at Birmingham and refused with reasons given in writing. They amounted to the fact that no reasons had been given as to why the matters had not been raised sooner. There was no mention of the previous hearing in June when there was an adjournment to obtain the material still being sought now.

35. The application had been put into writing and is set out in the second bundle from the appellant. This was repeated at the hearing.

36. I heard a full application but decided to refuse the request.

37. The request was made so that a medical report could be obtained in respect of any scarring/injuries to the appellant. Additionally so that witness statements could be taken from several people. I wanted to know whether an adjournment would actually achieve anything bearing in mind that back in June the same matters were mentioned and an adjournment at the hearing date granted so these matters could be dealt with. I invited Mr McWatters to make enquiries and let me know the following:

- a) has an expert been instructed already to give a report on the scarring/injuries?
- b) if not what are the proposals for instructing one? What timeframe is proposed?
- c) what efforts have been made to obtain witness statements from family members?
- d) when is it likely that such statements can be obtained?
- e) if no work has been done in respect of the above what is the reason for that?

38. I gave Mr McWatters time to go and find out the answers to the above. After he made the enquiries the case was called back on and I was told in no uncertain terms that there was no expert instructed and when I asked if one was likely to be instructed soon he was unable to give any positive indication.
 39. I was told that letters had been received from family members who could be potential witnesses but no efforts had been made to request witness statements themselves.
 40. I considered carefully the application and the written and oral submissions for the application.
 41. I have to consider the overall picture here including the overriding objective as set out within the 2014 Rules that cases are to be dealt with fairly and justly. There is Presidential guidance given to judges of the First-tier Tribunal. Rule 4(3) gives the power to adjourn or postpone a hearing. This power must be exercised in accordance with the overriding objective and having regard to any other relevant considerations.
 42. I refer myself to the decision of the Upper Tribunal in **Nwaigwe (Adjournment; fairness) [2014] UKUT 00418 (IAC)**. The Upper Tribunal looks at whether the requesting party will be deprived of a fair hearing if an adjournment is refused. Bearing in mind that there was no suggestion that further witness statements were going to be taken, that nothing had been done since June 2015 and also that no expert was instructed and no information that one was going to be I could see no reason to adjourn the hearing. Such an adjournment would, on the information I was told by Mr McWatters, achieve nothing more than further delay.
 43. Accordingly weighing up all matters I refused the application and the hearing continued.”
9. Paragraph 1 of the grounds of challenge suggests that the judge’s recording of the events on the day is in fact inaccurate. Paragraph 1 states the following:

“The judge acknowledged the applicant’s request for an adjournment which was put in writing and was also orally presented by the appellant’s Counsel [34]. The request was made so that a medical report could be obtained in respect of the scarring injuries of the appellant. Additionally so that witness statements could be taken from the appellant’s family members [37]. The claim by the judge ‘After he made the enquiries the case was called back on and I was told in no uncertain terms that there was no expert instructed and when I asked if one was likely to be instructed soon he was unable to give any positive indication’ [38], is false. The appellant’s solicitors had already instructed an expert in order to obtain the scarring report for the appellant. This was communicated to the appellant’s Counsel to inform the judge at the hearing.

The judge's claim 'I was told that letters had been received from family members who could be potential witnesses but no efforts had been made to request witness statements themselves' [39], is inaccurate. The appellant's solicitor clearly informed the appellant's Counsel on all efforts which had been made to obtain the witness statement which will be ready in a short time. The judge had not satisfied the overriding objective as set out within the 2014 Rules that the cases are to be dealt with fairly and justly as seen in the decision of the Upper Tribunal in **Nwaigwe (Adjournment; fairness) [2014] UKUT 00418 (IAC)**. Rule 4(3) gives the power to adjourn or postpone a hearing. This power must be exercised in accordance with the overriding objective. It is a fundamental rule that, in the absence of statutory authority or consensual agreement or the operation of necessity, there is a right to an unbiased decision maker. At common law this rule will be applied where the fair-minded and informed observer, when considering the facts, would conclude that there was a real possibility that the decision maker was biased in the case."

10. The first point to note in relation to ground 1 is it does not suggest a procedural irregularity on the basis of a failure to adjourn, it does appear rather to be making a specific allegation that the judge did not approach this matter in a fair and open way with an open mind willing to listen to both parties' submissions and the evidence that was available and arrived at a balanced decision having assessed the appropriate weight to be given to that evidence. I will say at the outset there is no basis established, either in the papers or before me today, to justify a finding that the judge approached this matter in anything other than in an open and fair-minded manner. The assertion of bias is wholly inappropriate and is not made out on the facts and indeed was not pursued before me by Counsel today, to his credit. There is absolutely no merit in such an assertion.

11. The other issue that concerns me relates to the accusations made in paragraph 1 of the grounds and whether Mr Khan, in stating what he did, is in breach of his duty of candour which requires him to be honest at the very least in relation to the matters that have been put to the Tribunal and not to set out pleadings which are clearly inaccurate or false. I make this statement as Mr McWatters, in accordance with directions, signed and filed a witness statement. Although the witness statement does not contain a declaration of truth immediately above the signature the statement is opened with the words "I, Chris McWatters, of Garden Court Chambers, 57-60 Lincoln's Inn Fields, London, WC2A 3LJ, make this statement believing that its contents are true". I accept this as a valid witness statement and have no reason to believe that an admitted member of the bar practising from Garden Court Chambers or Mr McWatters would have any reason to mislead this Tribunal in the material that he has produced. It is a short statement but I will read it in full:
 - "1. I am a barrister practicing from Garden Court Chambers in London.

 2. On 11th November 2015 I was instructed by HK solicitors to represent Niranjini Sabaratnam at a full asylum appeal hearing at the Asylum and Immigration Tribunal in Birmingham.

3. An application for an adjournment had already been made on the papers in order for Ms Sabaratnam to obtain a medical legal scarring report, and for her to obtain further witness statements from her relatives. This had been refused. I was instructed to reapply for the adjournment orally at the hearing.
 4. At the hearing on 13th November, prior to making the application, I was asked by First-tier Tribunal Judge Kershaw to obtain certain information from HK solicitors. I have now read his determination and I can confirm it is an accurate account as to the approach he took and the answers I gave in respect of the information he required regarding the proposed expert and the proposed witness statements.
 5. When I spoke to the solicitors, I only ever spoke to a paralegal who was handling the case, and he informed me that he had lined up a psychiatrist in respect of the scarring report. I was also informed that the solicitors were in the process of acquiring witness statements but could not give me timescales. At no stage have I ever spoken with the solicitor with conduct of the case.
 6. It was only at the hearing on 13th November 2015, that I discovered that an application for an adjournment had been made several months before in order for Ms Sabaratnam's representatives to obtain further expert evidence and witness statements from her relatives, as well as discovering that the solicitors had failed to go about acquiring this evidence.
 7. It was evident that Ms Sabaratnam had not been well represented by HK Solicitors, and I made my views on that point clear to her accordingly.
 8. I was never sent a copy of the determination of First-tier Tribunal Judge Kershaw by HK Solicitors, and after the hearing on 13th November 2015, I received no further communication from HK solicitors."
12. Two points arise from this statement. The first is that there is no evidence within the Tribunal file including the judge's note that the statement in paragraph 7 of Counsel's witness statement, namely the communication between Counsel and his client in relation to the standard of service represented by HK Solicitors, was ever communicated to the judge. That is a statement that would have been protected by legal professional privilege at the time and there is no indication that Counsel breached any professional obligation owed to his client in relation to his views vis-à-vis HK Solicitors.
 13. The assertion therefore that in the determination between paragraphs 34 and 43 the judge failed to accurately record what he had been told by Counsel is materially incorrect. Such an allegation has not been proved or established on the material made available to me.

14. Before this Tribunal today Mr Bandegani has provided a useful skeleton argument. It was handed up at the hearing and I make no further observation with regard to that. In his skeleton argument Mr Bandegani analyses the approach taken by Judge Kershaw in relation to not only the content of the determination but also Judge Kershaw's letter written to the Resident Judge at Field House in response to the assertions that have been made against him.
15. It is not disputed that if an adjournment application is made, the issue is that of fairness. In assessing the question of fairness the test to be applied is whether there was any deprivation of the affected party's right to a fair hearing. This does not require a judge to adjourn a matter on receipt of each and every request for an adjournment that has been made but it does require the judge to consider all the material available before him or her before coming to a conclusion as to whether a fair trial can be undertaken. Having looked at the material in this file with great care, both prior to the earlier application and in relation to today's proceedings, I make two findings of fact that apply to the judge's assessment of the evidence. The first of these is that it is clear that the judge did consider the evidence made available to him with the required degree of anxious scrutiny. The second finding is that it is clear from reading the determination that the judge has given adequate reasons for the findings made in relation to the application for an adjournment and in proceeding thereafter in relation to his dismissal of the core account advanced by the appellant. As such the weight to be given to that evidence was a matter for the judge.
16. In his submissions Mr Bandegani summarised matters in a very accurate way. We were discussing at that point the issue of materiality and it was submitted that the findings on the deficiencies, when taken with other material not available, shows that the decision of the judge was one in which it was capable of being found that the appellant's claim had in fact been shown to be met on the evidence. That of course is a statement made with the benefit of hindsight and in this respect I refer specifically to the scarring report that has now been made available. The date of the medical report the appellant is now seeking to rely upon is that dated 5 June 2016 following examination on 29 April 2016, five months after the hearing on 13 November 2015. I am sure many judges and advocates wish they had the benefit of perfect hindsight and if they did it may be that some decisions that are made would not be made in the terms that they are, but that is not the required test. As stated, a judge is not required to adjourn a matter solely because a party requests it to obtain evidence. Indeed as long ago as 2003 in the case of **A (Afghanistan) [2003] UKIAT 165** where an Adjudicator refused to adjourn part-heard to allow a medical report to be produced. The Tribunal said the Adjudicator was entitled to refuse the request and was required to do so as the appeal could be justly determined without the adjournment. There had been ample opportunity before the hearing to obtain a medical report and the representatives were aware of the circumstances that suggested that medical evidence might be relevant.
17. In relation to medical conditions, the Court of Appeal in **R (On the application of AM (Cameroon)) v AIT [2007] EWCA Civ 131** found that unfair decisions on

interlocutory matters such as adjournments or the admission of evidence can amount to errors of law but such decisions will have to be grounds for arguing that they display gross procedural unfairness or a complete denial of natural justice. In that case the Court of Appeal thought that test had been met as the judge refused to adjourn and the appellant was medically unfit to give evidence because he listed the case for a day when Counsel was not available and because he refused permission for evidence to be taken on the telephone.

18. It is important that we do not lose sight, when considering the allegation of procedural unfairness, of the chronology and the matters that were before the judge. This judge was perhaps more generous in the approach taken, bending over backwards it could be said to ensure that matters were properly examined and adopting a fair approach to ensuring that all matters were properly considered, including asking Counsel to go and find answers to five specific questions. It is clear that when Counsel returned, no explanation for the failure to provide the material that the adjournment was sought for had been provided. In general or specifically in relation to the additional time that the Tribunal had granted on the previous occasion.
19. Directions are not given for the benefit of a court/tribunal with an expectation that an advocate will not comply with the same. They are given to ensure effective, cost-effective, and efficient case management. Parties including Home Office Presenting Officers are under an obligation, a professional obligation, to comply with directions given by the Tribunal and it cannot be suggested that the parties were unaware of the fact a further opportunity had been granted by the First-tier Tribunal to enable the appellant to produce the evidence within a specific time.
20. Mr Bandegani, before the Tribunal today, has spent some time discussing the fact that it appears with the benefit of hindsight that the reason that report was not obtained was that HK Solicitors had not bothered asking for one. I do accept Mr Bandegani's submission that the judge was confused in relation to the issue of information received. The psychiatric report was clearly one that was available to the judge. The judge refers to the medical evidence and the adjournment application that had been made and that was reviewed or renewed at the hearing, specifically relating to the scarring report.
21. The suggestion that with the benefit of hindsight it should have been known to the judge or that the judge should have been able to work out for himself the reason for the failure of HK Solicitors to commission the report, has not been made out on the basis of the information available to the judge at that time. It is of particular importance to note that Mr McWatters when returning to the judge failed to explain to the judge or give any indication that the matter may have arisen as a result of improper representation by the solicitors. For that reason although Mr Bandegani relies on the case of **FP (Iran) and MB (Libya) v Secretary of State for the Home Department [2007] EWCA Civ 13** which I accept is authority for the point that clients are no longer fixed by the failings of their legal representatives, the failings of the legal representative were matters not made known to the judge on the day. In fact so

far as the judge was concerned it appeared that no report was available and there was no timescale provided as to when one would be made available. On that basis the judge was fully entitled in law to go on to consider whether the matter could be fairly adjudicated upon on the basis of the available evidence and his finding that it was, in all the circumstances, has not been shown to amount to legal error on the basis of the judge's conduct, recordings, or the issue of procedural irregularity. Ample time was given, everybody knew what was required, somebody did not do it, the judge was arguably entitled to act as he did.

22. In relation to a further submission by Mr Bandegani as to the materiality of the expert report, we have now had the opportunity of reading that report in which comment is made upon the scarring, including whether it is consistent or not in relation to the appellant's explanation. It appears the report has been written on the basis of a short interview with the appellant. It is settled law that medical reports are not, or should not be, obtained by legal representatives with a view that the medical report comments upon credibility. **HH (Ethiopia) Court of Appeal [2000] Civ 306** is authority that it is not a function of the medical expert to comment upon the claimant's credibility and in **HE [2004] UKIAT** Mr Justice Ouseley then President of the Upper Tribunal found that the Tribunal said that practitioners should take care in putting forward medical reports as probative of their client's credibility. A doctor will normally accept what his patient tells him and indeed it is not his role to assess whether what his patient tells him is true. When a doctor says that physical features such as scarring are consistent with a patient's account of how he came by them, this has the effect only of not negating the claim since they may be equally consistent with other causes. A psychiatric report is even more dependent on what the patient says. Even a diagnosis of PTSD or depression actually reflects symptoms which the patient is genuinely suffering. There may well be other causes where the report simply recounts a history which the Adjudicator is minded to reject and contains nothing which does not depend on the truthfulness of the appellant, the part which it plays in the assessment of credibility is negligible.
23. The reason the judge dismissed the appellant's claim of involvement with the LTTE, torture and the medical evidence, is simply summarised by the judge at paragraph 65 of the determination where he states:

"I cannot accept her evidence on being ill-treated as claimed. There are too many factual discrepancies in my finding. I am lenient as towards the years things happened but the events and in particular being ill treated would be matters I would have expected consistency in and that is not the case here."

The judge has given adequate reasons for finding that the appellant is not a reliable witness, especially having seen and heard her give oral evidence and there was nothing in the scarring report which we have now seen that would suggest that, notwithstanding the lack of successful challenge to the procedural aspects, the interests of justice need this matter to be reopened. It is also a case that if a report obtained after the determination gives rise to a different outcome, it is always open to the appellant to make a further application, a fresh claim, to the Secretary of State,

although she elected not to do so but to pursue this challenge before the Tribunal today.

24. Having taken careful account of what Mr Bandegani has said in relation to this matter and all the evidence before me I do not find that the appellant has made out that there is any arguable legal error in the determination of Judge Kershaw which is the determination under challenge. For that reason the appeal is dismissed.

Decision

25. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

No anonymity direction is made.

Signed

Date 2 June 2016

Upper Tribunal Judge Hanson