



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

Appeal Number: PA/04978/2016

**THE IMMIGRATION ACTS**

**Heard at North Shields**

**On 13 March 2018**

**Decision & Reasons  
Promulgated  
On 21 April 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES**

**Between**

**A. A.  
(ANONYMITY DIRECTION MADE)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Boyle, Solicitor, Halliday Reeves Law Firm

For the Respondent: Mr McVeety, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Iraq, who originated from the KRG. He entered the UK illegally, and then claimed asylum on 27 November 2015. That protection claim was refused on 29 April 2016. His appeal against that refusal came before the First-tier Tribunal at North Shields on 24 August 2017, when it was heard by First-tier Tribunal Judge Hands. The appeal was dismissed on all grounds in a decision promulgated on 13 September 2017.

2. The Appellant's out of time application for permission to appeal was refused by First tier Tribunal Judge Kinnell on 16 October 2017. The application was renewed to the Upper Tribunal on lengthy grounds drafted by Counsel who had represented the Appellant at the hearing before Judge Hands. Those grounds were not supported by any witness statement from either the Appellant, or Counsel who had appeared below, in order to provide evidential support for either the assertions made therein as to what had occurred on the day of the hearing, or, to explain what it was said would have happened differently had a different course been adopted by the Judge. Nor was the renewed application for permission to appeal that was made to the Upper Tribunal supported by such evidence, although this too was made on lengthy grounds drafted by Counsel who had represented the Appellant at the hearing before Judge Hands.
3. When the hearing of this appeal was called on before me, Mr Boyle (who did not appear below) confirmed that no application to introduce evidence under Rule 15(2A) of the Upper Tribunal Procedure Rules had ever been made on behalf of the Appellant. Nor was such an application to be advanced, late.
4. It is not disputed before me that the grounds to the application for permission to appeal raised the three broad complaints identified and summarised by Upper Tribunal Judge Smith.
5. Firstly, Upper Tribunal Judge Smith refused permission to appeal in relation to the complaint that the appeal should have been adjourned because of Counsel's concerns about the Appellant's fitness to give evidence. She noted that it was *"unarguably open to the Judge to find that the medical evidence did not make out any difficulties in that regard and to reject a request for further time on that account."* That complaint was not renewed before me.
6. Secondly, Upper Tribunal Judge Smith refused permission to appeal in relation to the complaint that the Judge's summary of the psychiatric evidence contained within the decision was erroneous. However she did grant permission to argue that having found that the Appellant's condition would worsen if treatment were discontinued [44], the Judge might have erred because in the light of that finding her conclusions in relation to the Appellant's prospects upon return to the KRG were not open to her [73]. That complaint was not pursued before me by Mr Boyle, and in my judgement he was correct not to do so. I note that the Appellant accepted that he originated from, and had always lived within, the KRG. Judge Hands concluded that it was open to him to return to the KRG in safety, and that he would be reunited there with his family and friends, who could provide him with such economic and emotional support as he might need. She rejected the Appellant's claim that he would be unable to access treatment for any mental health condition he may genuinely suffer within the KRG. In the circumstances there was no room for the inference that there was a real risk that any necessary medical treatment would be discontinued in the event of return to the KRG. Subject to the other

complaints for which permission to appeal was granted there is in my judgement no error in that approach, and that was no doubt why the complaint was not pursued further before me.

7. The third area of complaint concerned the Judge's refusal to accede to the second request for an adjournment of the hearing, an application that was made once the hearing had begun, in the following circumstances. The Appellant when called by Counsel to give evidence in his own appeal declined to adopt the witness statement that had been prepared for him by his solicitors, (although I am told that he did accept that he had previously signed a declaration of truth at its foot when asked to do so by his solicitors). The Judge recorded in her decision the explanation that she was offered by the Appellant for this stance [19]. The Appellant told her that he had not been able to understand his solicitor, and that she had not been able to understand him, because he could not properly understand the interpreter booked by his solicitor for the occasion upon which his instructions were taken for that statement. He went so far as to deny having ever said some of the things that were contained within the statement. The Judge concluded, accurately in my judgement, that the Appellant was not saying to her that he had any problem in understanding her or the representatives, or, in understanding what he was saying at the hearing to them, or, indeed any problem in understanding what was contained within the written statement. On the contrary he was saying to her that he did understand the content of the witness statement, and that he believed that it was inaccurate, and did not represent the instructions that he had tried to give to his solicitors, and thus, the evidence that he wished to give in support of his appeal [20].
8. The Judge's solution to the situation she was presented with was twofold. First, she declined to accept into his evidence the witness statement that the Appellant had disowned; no complaint is made before me on the Appellant's behalf in relation to this. Second, she invited Counsel to undertake a full oral examination in chief of the Appellant - a practice that used to be commonplace in civil litigation of all types, and which is of course still in use in the criminal courts. It is this decision which was the subject of argument in the course of the hearing before me, Upper Tribunal Smith having granted permission to appeal in the following terms; *"the second reason was the Appellant's lack of understanding of the written statement he had given. Whilst the Judge took measures no doubt designed to overcome the difficulties, it is arguable that proceeding immediately with the hearing and requiring Counsel to deal with the Appellant's evidence in chief without the benefit of any written statement and without the opportunity to take instructions was unfair to the Appellant"*.
9. It is of course far from unusual for a witness (whether they be a party to litigation or not) to question from the witness box the accuracy of the witness statement prepared for them, or, to diverge from it - sometimes dramatically. I would venture to suggest that by far the majority of those with experience in litigation will have enjoyed such an experience from

time to time. There is no automatic right to an adjournment of the hearing in such circumstances to consult with those who prepared the original statement, or, in order to prepare an alternative. One of the skills required of a litigator is to judge either how best to take advantage of such an occurrence, or, how best to deal with it without sustaining undue damage to the disputed point(s) in issue, depending upon their role within that litigation.

10. Moreover there is nothing inherently unfair in taking an individual's evidence by way of a full examination in chief. To be fair to Mr Boyle he did not suggest that there was. As he accepted, absent inherent fundamental unfairness, it would be difficult if not impossible to identify unfairness in a process, in the absence of any evidence as to what the different outcome would have been, had the different course contended for been followed.
11. It is not suggested that there is any evidence before me to suggest the Judge unfairly truncated the exercise she required Counsel to undertake of eliciting the Appellant's evidence in chief in full by question and answer. The manner in which that exercise was undertaken, and the scope and content of the questions asked to elicit the Appellant's evidence in chief, was left to Counsel's professional judgement. One option that was open to Counsel was therefore to go through the witness statement asking the Appellant to identify and correct the passage(s) with which he disagreed. Another was to use the statement merely as her own prompt, and then by asking open questions to lead the Appellant through his account by stages, thereby allowing him to give his evidence in his own words. There is no evidence to suggest the Judge sought either to direct how Counsel should approach her task, or, to interfere in the process she chose to adopt.
12. Counsel was of course well aware of the content of the record of the Appellant's interview by the Respondent - and thus knew how he had presented his own case when interviewed by the Respondent. Counsel also knew the credibility points that had to date been taken against him by the Respondent, because they were set out in the reasons given for the refusal of the protection claim. Counsel had the benefit of instructions from her solicitor, which included the detailed witness statement the Appellant had declined to rely upon, to explain how her instructing solicitors anticipated the Appellant's case should be advanced at the hearing. Counsel did not at any stage suggest to the Judge in the course of the hearing that the Appellant had sought to advance a new claim of which she, or her instructing solicitors were previously unaware.
13. Moreover, as the Judge recorded [7] neither the Appellant nor his Counsel raised any concern at any stage of the hearing over the quality of the interpretation services provided by the Tribunal to the Appellant.
14. When Counsel had concluded the Appellant's examination in chief it is common ground that the Judge was left with a radically different factual

account to that which the Appellant had offered to the Respondent at interview. The Appellant did not return to the account given at interview when subject to cross-examination. The task for the Judge was thus to assess the weight that could be given to his evidence in the light of the medical evidence concerning him. That is what she did, and her conclusion was that the Appellant's inability to give a consistent account was the result of his seeking to advance a series of fictitious accounts, rather than a feature of any illness [43-]. It is extremely difficult to see how the grant of a short adjournment prior to taking the Appellant's evidence in chief would have led the Judge to any different outcome.

15. In the circumstances I invited Mr Boyle to address what precisely was said to have been unfair about the Judge's approach. He accepted that there might well be nothing wrong with the Judge's approach to the exercise of taking the Appellant's evidence, but that in the light of the medical evidence this process was inherently unfair to the Appellant because Counsel was expected to undertake that exercise without being given time to take his detailed instructions upon his evidence prior to its commencement. Thus he argued that having decided to take the Appellant's evidence in this way, the Judge was bound to grant to Counsel as much time as she might desire in order to talk to the Appellant. In reality therefore the criticism advanced is that Counsel was not given the opportunity to undertake a full dress rehearsal with the Appellant of his evidence in chief, before he was required to give his oral evidence to the Judge. In my judgement there is no merit in such a criticism. There is no evidence from the Appellant to suggest that he was denied the opportunity to say anything he wished to say, or, that the process adopted led to any misunderstanding of the terms of his oral evidence by the Judge. This was an individual who had attended the hearing of his own appeal expecting to be able to give evidence in support of his own appeal, and he did not suggest at any stage that he was not ready, willing, and able to do so. He was of course uniquely positioned to give that evidence since it required him only to recount his recollections of his own experiences. It is extremely difficult to see in these circumstances how it could sensibly be argued that he was in any way disadvantaged by the denial of the opportunity to conduct a dress rehearsal of that process with Counsel on the day of the hearing. On the contrary the process adopted by the Judge gave him every opportunity to give his evidence at his own speed, and in his own words. Indeed in my judgement the absence of any explanation from the Appellant as to how he was in practice disadvantaged by the course adopted speaks for itself.
16. Mr Boyle's argument also failed to engage with the practical difficulty inherent in the course he suggested the Judge should have adopted once the Appellant had disowned his witness statement. Even if there is no evidence from Counsel as to what occurred, or what she would have wished to have done, or what it is claimed would have flowed from that alternative, paragraph 14 of the grounds of the application for permission that she drafted makes it clear that she felt unable to communicate with the Appellant directly because she did not speak Dari, and the Appellant

admitted to no fluency in English. Assuming that proposition to be correct, I am satisfied that she could only communicate with him within the courtroom as part of the appeal hearing using the Tribunal's interpreter, unless her instructing solicitors were willing, and able, to arrange a telephone interpretation service for her to use at the hearing centre during any short adjournment the Judge granted her. It is accepted before me that no interpretation service had been arranged for Counsel to use to communicate with the Appellant in advance of the hearing. Indeed Mr Boyle accepted that he could offer no evidence to suggest that such a service could in fact have been arranged at short notice for Counsel to adopt the course argued for. Given the Appellant's claims about the quality of interpretation provided to him in the past, by both the Respondent and his own solicitor, it is very far from clear that the process for which Mr Boyle argues could actually have taken place, or that it could have led to anything other than further confusion between the Appellant and his lawyers over precisely what he wished to say in evidence. The reality of course, as noted above, is that the course adopted by the Judge has not led to any complaint from the Appellant that his oral evidence omitted any material fact or detail, or, that it was in any way misunderstood by the Judge. The Judge was clearly careful to confirm throughout the hearing that the Appellant did understand the interpreter.

17. Mr Boyle advanced the argument that the process adopted by the Judge failed to comply with the terms of the Joint Presidential Guidance Note No 2 of 2010 "Child, vulnerable adult and sensitive appellant guidance". Asked to identify the passage relied upon he referred me to paragraph 7; *"Enable the appellant to have adequate time prior to the commencement of the hearing to familiarise him/herself with the hearing room and give instructions to his/her representative."* There is no suggestion that any effort was made by those representing the Appellant to introduce him to the hearing room in advance of the appeal being called on, and in my judgement nothing turns on that passage. Moreover the need to provide adequate time to take instructions does not permit a representative to demand from a Judge whatever time they might choose. If it did it would be possible to defer a hearing indefinitely. Had those representing the Appellant considered it necessary or desirable there had always existed the opportunity for Counsel to meet the Appellant in advance of the hearing date, and then to take any instructions he wished to deliver with the luxury of time. There is no suggestion that this course was ever considered necessary, or desirable.
18. Ultimately Mr Boyle accepted that the decision had to be assessed as a whole, in the light of the Presidential Guidance, in order to decide whether the Appellant had a fair hearing. He then accepted that there was nothing within the text of the decision that gave rise to any realistic ground for concern that the Judge had misunderstood any aspect of the Appellant's evidence. It is not open to me to infer that Counsel was unable to advance the Appellant's case properly because she misunderstood any aspect of the Appellant's evidence. There was no renewal by Counsel of the application for an adjournment as a result of problems experienced with

the course adopted to taking the Appellant's evidence. In the circumstances since there was nothing inherently unfair in the process by which the Appellant's evidence was taken, Mr Boyle accepted that the complaint advanced could be reduced to the question; was the Judge's decision to take the Appellant's evidence when she did, as opposed to later in the day, sufficient to deny the Appellant a fair hearing of his appeal? For the reasons set out above, I am not satisfied that it was.

19. In the circumstances, and notwithstanding the terms in which permission to appeal was granted, I therefore dismiss the Appellant's challenge, and confirm the decision to dismiss the appeal on all grounds.
20. The anonymity direction previously made is continued.

#### Notice of decision

The decision promulgated on 13 September 2017 did not involve the making of an error of law sufficient to require the decision to be set aside. The decision of the First tier Tribunal to dismiss the appeal is accordingly confirmed.

#### Direction Regarding Anonymity - Rule 14 of the 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 his 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

Date 14 March 2018

Deputy Upper Tribunal Judge J M Holmes