



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10672/2017

THE IMMIGRATION ACTS

Heard at Field House
On 13 June 2018

Determination Promulgated
On 30 July 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MR SANA AHMED
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rahman
For the Respondent: Ms Willocks-Briscoe

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born in 1987. He appeals against a decision of the Secretary of State made on 28 September 2017 to refuse his claim for asylum.
2. The respondent did not believe his claim to be at risk from the government and the Awami League because of his activities for the Bangladeshi National Party.
3. He appealed.

First tier hearing

4. Following a hearing at Taylor House on 7 March 2018 at which the appellant appeared but not his counsel, Judge of the First-tier AM Black dismissed the appeal. Her

findings are at paragraphs 39 to 65, she concluded that the appellant's claim of having come to the attention of the authorities in Bangladesh because of his political activities and of being at risk on return was a fabrication.

Error of law hearing

5. He sought permission to appeal which was granted on 10 April 2018.
6. At the error of law hearing Mr Rahman sought to rely on the sole ground of appeal, namely, that the judge had been unfair to refuse the appellant's application for an adjournment made on the morning of the hearing because his counsel (Mr Rahman himself) had been ill. Such has been intimated to the Tribunal by a telephone call and email from counsel and by fax by the instructing solicitors before 1000 hours. The decision to proceed in the absence of counsel amounted to the appellant being deprived of a fair hearing. The decision should be set aside and remitted to the First-tier for rehearing.
7. Ms Willocks-Briscoe's response was that the judge had been entitled to proceed in the absence of representation. There was no indication of what counsel's illness was. Also, the issues, which went to credibility, were not complex.

Consideration

8. The judge set out at paragraph 5ff the circumstances when the case called and the reasons why she decided to refuse the adjournment application. At [5] she notes:

'At 0954 hrs on the morning of the hearing the tribunal received a faxed letter from the appellant's solicitors, J Stifford Solicitors as follows:

"Please note that we have been informed by the instructed Counsel Mr Leu Rahman, this morning that he is seriously sick, therefore he is unable to attend at today's hearing.

We would be grateful if you could kindly adjourn the Today's (sic) hearing and fix a new date."

9. She continues at [6]:-

'The appellant attended the hearing. He told me he spoke sufficient English to enable him to deal with the application for an adjournment. He told me he had received a text message from his Counsel that morning and had spoken to him. He said his Counsel, Mr Rahman was "very ill" and had a temperature; he was unable to state the nature of the illness or when his representative would be sufficiently well to attend a hearing. I pointed out that I had been provided with a bundle of documents for the appellant together with his witness statement. The appellant confirmed the statement had been prepared with his representative and that it had been read back to him in Bengali. He wanted to rely on it in the appeal. He confirmed that he had seen the interview record and that this had also been read back to him in Bengali. He said he had no idea about

the law relating to his appeal. He said he "would be very grateful" if the hearing were adjourned to enable his representative to attend to deal with the legal issues.'

10. The judge went on to note that this application was opposed by the Presenting Officer on the grounds that no notice of the application had been given and there was a lack of medical evidence in support of it.
11. The judge then directed herself to the overriding objective as set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
12. She went on (at [9]) to state:

'... The principal issue was whether it would be fair to proceed in the absence of the appellant's Counsel. Put another way, would the appellant have a fair hearing in his representative's absence.'
13. She concluded that it was fair to proceed. There were no significant legal matters, it came down to credibility.
14. The judge records that on being told that the application was rejected the appellant asked her to review her decision asking that the case be adjourned to the following day. He could not explain how such would be possible when he had earlier said his counsel was *'very ill.'* The decision was maintained.
15. He then requested an interpreter. By the time one was obtained it was 1540 hours. The judge considered it appropriate to start at that time because the Presenting Officer had said he did not have lengthy cross-examination for the appellant, the only witness.
16. The judge next states that the appellant made a further application for an adjournment adding that *'he was nervous about proceeding without a legal representative; he had been told by his counsel that the hearing would be adjourned.'*
17. The judge narrates that she assured him that the hearing would be fair and that *'he was given every opportunity to address the issues to be decided in the appeal.'*
18. She adds that she reminded herself of the Surendran Guidelines and *'reassured the appellant again.'* Proceeding to ask him whether the contents of his statement were true, he said *'he did not want to continue with the hearing.'* He was told that if he did not participate that may prejudice the outcome of the appeal. He was told he had the opportunity to give his evidence on the relevant issues. He responded that there were *'some legal issues which cannot be clarified without his barrister.'*
19. The appellant then said the hearing was being *'conducted forcefully'* and that he did not want it to continue. He was *'being forced to continue with it'*, and *'he would not get a fair trial'*, that he *'came for a fair decision and that will not take place.'* He had *'not expected the hearing to proceed.'*

20. The judge notes that he '*refused to answer any questions; he merely said he did not want to continue.*'
21. There was no cross-examination. He declined to make any submission at the end of the case.
22. The judge then advanced to consideration of the claim and to her adverse findings at [30-66].
23. The sole issue is whether the appellant was deprived of a fair hearing as a result of the judge's decision to refuse his application for an adjournment because of the non-attendance of his counsel due to illness.
24. In *Nwaigwe (adjournment: fairness)* [2014] UKUT 418 the then President said (at[7]):

'If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations, permitting immaterial consideration to intrude; denying the party concerned a fair hearing; failing to apply the correct test, and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.'

25. And at [8]:-

'The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan v SSHD) [2011] EWCA Civ 1284 at [13]:-

"First, when considering whether the Immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair."

26. In this case the judge gave careful consideration to the application and to her reasons for refusing it (as indeed, she did to the substantive claim). She makes reference to whether it would be fair to proceed in the representative's absence. However, in my view she erred in refusing the application.
27. First, there was no suggestion by the judge that she doubted that counsel was, as he stated, ill and unfit to attend and represent the appellant. Intimation of that was given orally via the appellant and by fax from the solicitors and by telephone and email from counsel shortly before the hearing was due to begin. The email gives some

information, albeit brief, about his illness. Whilst the late intimation is unfortunate, illness can of course strike at any time. It is not always possible, quickly, to get a medical note.

28. Further, the appellant attended on the morning. He was not an unrepresented appellant. He expected to be professionally represented. That he was not was entirely beyond his control.
29. The judge's decision to proceed was on the basis that it was not a complex appeal, that the credibility of the account including the reliability of documents was the issue and that the judge would seek to ensure that the appellant had the opportunity to put his case fully.
30. However, the appellant refused to participate, claiming that he would not get a fair hearing, that he was being compelled to conduct his case without the assistance of his counsel against an experienced representative of the State. Such perception was perhaps understandable in light of the unavoidable absence of the person he expected and was entitled to be represented by, and in the stressful situation most appellants are likely to feel when attending a hearing. His view, as the judge noted, was that *'there was no one on his side.'*
31. I note paragraph [8] of Nwaigwe:-

'... Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court ... in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request ... In the present era the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always yield to the parties' right to a fair hearing. In determining application for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness.'

32. The judge referred to the overriding objective. However, in failing properly to have regard to the fact that the appellant attended, that he was represented, that the representative was, through no fault of his own, unable to attend to assist the appellant, the decision to proceed amounted to the deprivation of the right to a fair hearing. I consider that the error of law was material. The respondent takes against him credibility issues in respect of his oral account and documents produced. He would no doubt seek to address these with the assistance of his representative. It cannot be said that the appeal is doomed to fail.
33. The result is that the case must be reheard.

Notice of Decision

The decision of the First-tier Tribunal showed material error of law. It is set aside. None of its findings are to stand.

The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-tier Tribunal for an entirely fresh hearing. The member(s) of the Tribunal chosen to consider the case are not to include Judge Black.

No anonymity order made.

Signed

Date 26 July 2018

Upper Tribunal Judge Conway