



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

Appeal Number: HU/11565/2019

THE IMMIGRATION ACTS

**Heard at: Manchester Civil Justice Centre
(hybrid)
On: 19th July 2021**

**Decision & Reason
Promulgated
On: 06th October 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Farkhanda Javed
(no anonymity direction made)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**For the Appellant: Mr Abbas, Counsel instructed by Imperium Group
Immigration Specialists**

**For the Respondent: Mr McVeety, Senior Home Office Presenting
Officer (2020)**

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 1st January 1953. She appeals against the decision of the First-tier Tribunal (Judge Tully) to dismiss her human rights appeal.
2. The matter in issue before the First-tier Tribunal was whether the refusal to grant the Appellant leave to remain in the United Kingdom would be unlawful under s6 of the Human Rights Act 1998. The

matter in issue before me is whether its decision, that it would not, is vitiated by procedural unfairness.

Proceedings in the First-tier Tribunal

3. The matter came before Judge Tully on the 17th September 2019. The Appellant's recorded representatives were not in attendance. The Appellant and her family were. Judge Tully asked the Appellant, with the assistance of an interpreter, whether she wished to proceed. The Appellant appeared, as it is recorded at paragraph 13 of the decision, "unsure what to say", so her son spoke up. He told the judge that an application for an adjournment had been made because his mother was mentally unwell and wished to call live evidence from a psychiatrist on the point. The psychiatrist in question had prepared a report but was not available for the hearing because he was on leave. Judge Tully asked the Appellant's son whether that was the only reason for the request and he confirmed that it was.
4. The Home Office Presenting Officer (HOPO) strongly objected to the matter being adjourned. The expert opinion had only been sought late in the day; it was very unusual to have a psychiatrist give live evidence and little would be achieved by cross examination; an adjournment would simply result in delay.
5. The Tribunal directed itself to rule 4(3)(h) of the Procedure Rules and to the overriding objective set out at rule 2. It then proceeded to set out the history of the matter thus far. An adjournment request had been made on the 4th September 2017 because the representative was waiting for a report from the psychiatrist; the report was subsequently produced, filed and served under cover of letter which – wrongly in the Tribunal's view – described the report as a 'draft'. In deciding whether to adjourn the Tribunal took the following matters into account: that the Appellant had had since the 21st June 2021 to instruct a psychiatrist; the assessment had taken place only a matter of days before the hearing; it is rare for a doctor to attend a hearing; the psychiatrist had only met the Appellant once and so could be expected to add little to his own report; the HOPO was present and ready to proceed; there would be delay and expense if the matter were to be adjourned. The adjournment request was, those factors in mind refused.
6. The Tribunal went on to dismiss the appeal. The grounds challenging the legality of the decision to do so are foreshadowed in the Tribunal's final paragraph on procedural matters:

"19. I indicated to the appellant and her son that the adjournment request was refused and I planned to proceed.

No further issues were raised at that stage. Later in the hearing during her evidence the appellant said that she was unsure why we were proceeding without her representative, however the matter had not been advanced at the start of the hearing by either her or her son. No explanation for absence was offered and it was clear that the representative was aware of the hearing date. I was satisfied that this comment from the appellant was more closely related to her not wanting to answer some questions that were put to her which raised difficult issues, than to a genuine confusion about why we were proceeding without her representative”.

Proceedings Before the Upper Tribunal

7. The grounds of appeal assert that paragraph 19 of the First-tier Tribunal betrays two errors in approach by the Tribunal:
 - i) Error of fact. A witness statement is produced by the Appellant’s son who avers that he did mention the lack of representation at the outset of the hearing;
 - ii) Procedural unfairness. Even if the lay Appellant and her family had failed to mention the lack of representative, it was a *Robinson* obvious¹ issue of fairness which the Tribunal should have considered of its own motion. The grounds pray Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) in aid. That was of particular pertinence given the Appellant’s prima facie mental health issues.
8. Permission to appeal was granted on the 6th March 2020 by Upper Tribunal Judge Macleman.
9. Mr Abbas, who appeared before me, was not the representative who did not appear at first instance. He explained that he has been involved in the case since its inception, but was not instructed at the relevant time. He had assisted the Appellant in making her initial application to the Home Office but after that she had gone elsewhere, instructing Addison & Khan Solicitors in Ilford to lodge and pursue her appeal. The Appellant and her family have told him, and the relevant information is produced before me in the form of a witness statement from the Appellant’s son Mr Waqar Javaid, that in the run up to the hearing they were advised by their representative that they should try and have the hearing adjourned in order to call the psychiatrist. It was not until the late afternoon of the 16th September, the day before

¹ R (on the application of Robinson) v Secretary of State for the Home Department [1997] EWCA Civ 3090

the hearing, that the family were told that the representative would not be attending. Mr Javaid asserts that he was advised to attend court and ask for an adjournment himself. Mr Abbas told me that he has tried, and failed, to contact Addison & Khan for comment. He has pursued them for copies of the case file, which has not been forthcoming. He candidly acknowledged that he does not therefore really know why they chose not to attend, nor why they thought that live evidence from the psychiatrist was so vital, nor why they have not provided him with the papers. He has contacted them on numerous occasions and has received no response.

10. The account given by Mr Abbas is in material respects supported by the court file.
11. The pre-hearing review record, dated the 27th August 2019, shows that the representatives indicated that Mrs Javed was experiencing mental health issues. Medical evidence was to be called. The hearing was listed for the 10th September 2019 but was adjourned upon application by Addison & Khan. By their letter of the 4th September 2019 the firm filed a letter from Consultant Psychiatrist Dr Waquas Waheed who stated that following an initial consultation with the Appellant on the 3rd September, he had formed the view that a) the Appellant was suffering from severe mental health problems and b) that he would like the opportunity to give oral evidence at the hearing where he proposed to provide “details of her mental health problems and the associated cultural context”. The application for an adjournment was successful, but only partially so. Addison and Khan had requested a new hearing date after the 25th September so that Dr Waheed could complete his full report. A new hearing date was set for the 17th September. Upon receipt of notice of that hearing Addison & Khan wrote again to the court, pointing out in a letter dated the 12th September that they had requested longer for the doctor to complete his assessment, and praying in aid Ngaiwe (adjournment-fairness) [2014] UKUT 00418 (IAC). The firm were advised by a Tribunal caseworker, on the 16th September 2019 at 14.45 in the afternoon, that they could make their application for a “postponement” on the day of the hearing.
12. In light of this material it is clear that Mr Abbas’ understanding of events leading up to the appeal is accurate. What is less clear is why the firm representing the Appellant chose not to attend the hearing before Judge Tully on the 17th September 2019. Judge Tully’s note of proceedings that day indicates that the hearing commenced with her confirming the language of the interpreter, recording those present and who was giving evidence, what documents she had before her and the procedure for the hearing being explained to the Appellant and her witnesses. Then under the heading ‘adjournment request’ it is recorded that someone – presumably the Appellant’s son Mr Javaid –

apologised and referred to the earlier requests for an adjournment. He explained that his mother was in poor mental health and that they requested a later hearing date. He referred to the letter from the psychiatrist. The judge's note then records "what can he say re the reps". The note then records the submissions of the HOPO, and the judge's decision, in the form that they are set out in the determination. The evidence was then called. At the beginning of the first witness' evidence - I assume this to be the Appellant herself - the judge records the comment "wouldn't it be better if the reps were here". The judge records her own response as follows: "the reps are not here. No adj request on that basis but in any event could proceed w/o rep".

13. In light of the judge's note I accept the substance of the evidence now offered by Mr Javaid, namely that he did mention the lack of representation and the outset, and that his mother also mentioned it as a concern when she gave her evidence.
14. Before I go on to consider the submissions made before me about this procedural history it is appropriate that I note that the information provided at the hearing by Mr Abbas is supported by the court file in one other material respect. That is that since his firm came on record on the 21st October 2019 they have repeatedly asked the Tribunal for copies of the papers: he also written to the Tribunal expressing concern about the conduct of Addison & Khan.
15. So, to the appeal before me. Mr Abbas acknowledges that up until the day of the hearing itself the only reason given for an adjournment being sought was that the Consultant Psychiatrist was not available on the given hearing date and he required more time to complete his assessment and report. Mr Abbas submits however that the family raised their concerns about the lack of representation on the day of the hearing; even if the judge had not understood that to have been given as a formal reason for the adjournment request made by the Appellant's son, it was an obvious issue of fairness, which persisted throughout the hearing. At the very least it should have been revisited when the Appellant herself raised it at the beginning of her oral evidence. Mr Abbas submitted that confronted by lay witnesses, none of whom were equipped to address the court on legal matters including Articles 3 & 8 ECHR, Appendix FM and paragraph 276ADE of the Rules, the Tribunal should have considered of its own motion whether it was in the interests of justice to proceed. The adjournment sought was a short one: a matter of a week or two.
16. Mr McVeety simply pointed out that on the face of the decision itself, the adjournment application was based squarely on the absence of the doctor. The report was before the court and it was not

clear why his live evidence was required: in this respect Mr McVeety agreed with the submissions made by the HOPO on the day.

17. For the sake of completeness I note that I was also referred by both advocates to the various written submissions made in the lead up to the appeal being listed in the UT for oral hearing. Directions were given, in light of the Covid-19 pandemic and lockdown, for these submissions to be made, and altogether I have read the grounds, the statement of Mr Javaid, further written submissions from Imperium Group and a skeleton argument by Mr Abbas; for the Respondent I have a 'rule 24 response' authored by Senior Presenting Officer Mr Lindsay, a written note by Zoe Young, the presenting officer before the First-tier Tribunal, and a skeleton argument prepared by Mr McVeety.
18. I note that in her written submissions the Respondent has focused on the factual accuracy of the statement made by Mr Javaid to the effect that he had raised the lack of representation at the beginning of the hearing. The Respondent asserts that this assertion "can only be made good on the basis of clear evidence", and Mr Lindsay in particular highlights the negative credibility findings that the judge made against Mr Javaid. All of that rather falls by the wayside in light of the judge's note, which indicates four things. First, that Mr Javaid did mention the lack of representatives in the course of his request for the matter to be adjourned. Second, that the Appellant herself raised it at the very beginning of her oral evidence. Third, that the day in court did not commence with the Tribunal making enquiries as to where the representatives were. Instead the Appellant and her witnesses were taken through all of the procedure and housekeeping. Even in a jurisdiction where we are used to dealing with litigants in person this was a firm that had been on record since the inception of the appeal: it is striking that the Tribunal did not apparently consider it necessary or appropriate to make that enquiry. Fourth, at no point during the hearing did the Tribunal consider, or invite submissions on, whether it was *just* to proceed in the absence of the Appellant's legal representatives. The note simply indicates that the hearing "could proceed w/o rep": that is not the same thing.
19. I am wholly satisfied that the non-attendance of the representative was a material consideration for the court in deciding whether the hearing should proceed, or continue. This was an Appellant who had, at least in the view of the Consultant Psychiatrist, "severe" mental health problems. Regardless of the view taken by the Tribunal of that evidence in its final analysis, it was required by the Joint Presidential Guidance Note No 2 of 2010: *Child, vulnerable adult and sensitive appellant guidance* to treat the Appellant as a vulnerable witness for the purpose of the hearing. That this was so had already been flagged in the court file by the pre-hearing review. That Guidance

Note specifies, *inter alia*, that consideration should always be given, *before* and *during* the substantive hearing to adjourning an appeal to enable a vulnerable appellant to get representation: see 5(vi), 5(vii), 10, 10.2(viii). The fact that it was not the basis of a formal application by a lay witness is largely irrelevant. It was clearly a concern raised by the family and it was obviously a matter that the Tribunal should have considered of its own motion. The power to adjourn is a general case management power derived from part 4 of the First-tier Tribunal (IAC) Rules. It can be exercised at any time and the duty of fairness requires the Tribunal, particularly in the case of vulnerable witnesses but not exclusively so, to exercise that discretion for the duration of the proceedings. The failure of the Tribunal to do so in this case renders its decision flawed for procedural unfairness. I set the decision of the First-tier Tribunal aside and remit the matter to the First-tier Tribunal for the appeal to be heard *de novo* by a judge other than Judge Tully.

Decisions

20. The determination of the First-tier Tribunal is flawed for error of law such that it must be set aside.
21. The decision is to be re-made in the First-tier Tribunal before a Judge other than Judge Tully.
22. There is no order for anonymity.



Upper Tribunal Judge Bruce

3rd August 2021