



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal number: PA/03574/2019 (V)**

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC**

**Decision & Reasons Promulgated**

**On 21 May 2021**

**On 03 June 2021**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**FA**

**(ANONYMITY ORDER MADE)**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**DECISION AND REASONS (V)**

For the appellant: Mr R Dar of Trojan Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Bangladesh with date of birth given as 2.4.88, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 5.9.19 (Judge Aujla), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 28.3.19, to refuse his late claim made in January 2019 for international protection.
2. In reality, the single ground of appeal is that it was procedurally unfair for the First-tier Tribunal to proceed to decide the appeal in the appellant's absence, given the medical evidence provided.
3. The application for permission to appeal was not admitted by Upper Tribunal Judge Martin on 2.3.20, it being lodged some 4 months out of time. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Jackson extended time to admit the application and granted permission on the basis that it was arguable that the First-tier Tribunal materially erred in law in failing to properly consider the appellant's request for an adjournment of the First-tier Tribunal appeal hearing on grounds that he was not fit to attend court to give evidence, resulting in inadequate and inappropriate findings made in the appellant's absence and any appellant's bundle, and leading to the dismissal of the appeal.
4. Whilst Judge Jackson criticised the failure of the appellant's representatives to attend the hearing, she considered that, "the real issue in this case is one of procedural fairness to the appellant and it is arguable that in all of the circumstances, particularly medical evidence from the end of July 2019 that he was suffering from depression with a PTSD element and feels unable to attend court and give evidence; that he has not had a fair opportunity to participate in his appeal."
5. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
6. This matter should have been heard by the Upper Tribunal in the remote hearing listed before Upper Tribunal Judge Norton-Taylor on 14.1.21. However, technical difficulties deprived the respondent from accessing any of the documents at the and in the interests of justice the matter was adjourned, with a number of directions designed to clarify the procedural history as to what was put before the First-tier Tribunal and when, and why neither an appellant's bundle was served in advance of the hearing nor why a representative failed to attend the hearing on behalf of the appellant. The

appellant's representative's responses to those directions are set out in their document dated 5.5.21, to which I have had regard.

7. At [14] of the impugned decision, the judge noted that there was no explanation for the absence of the appellant and his legal representative. The judge was satisfied that notice of the hearing had been provided and, given the correspondence history, it is undoubtedly the case that both the appellant and his legal representatives were fully aware of the hearing date, time and location.
8. The appellant's representatives made their first a pre-hearing application on 12.8.19 for adjournment, which was refused, as the First-tier Tribunal Judge was aware. They admit that the GP letter was not included when the adjournment application was renewed on 30.8.19, which was poor practice on their part. This second application was also refused, and the representatives accept that they received this second refusal. They state that they made yet another adjournment application on 2.9.19, the day before the hearing, this time enclosing the GP letter and imply that as they heard nothing in response by 3.9.19 they felt entitled not to attend. A more likely explanation, but just as inadequate, for their absence at the hearing is provided in that it is stated that the appellant had not instructed them to attend due to costs implications. It is further stated that they were unable to prepare for the hearing in the space of one day. It is further stated that they were unable to provide a bundle as the appellant was unable to instruct them because of the health issues referred to in the GP letter.
9. After considering their responses to directions, I find that there was no adequate or reasonable explanation for the failure of the appellant's representatives to attend the First-tier Tribunal appeal hearing on his behalf on 3.9.19. As has already been suggested, they could, at the very least have renewed the adjournment application orally, and ensured that all relevant evidence in support of it had been provided. The reality appears to be that the case was not ready for hearing and had not been prepared despite adequate advance notice of the hearing having been provided. It was also arrogant to assume that the application would be granted.
10. The GP letter of 31.7.19 relied on to justify the adjournment application was entirely inadequate. Other than describing the appellant's conditions, it provided no medical opinion as to whether the appellant was in fact unfit to attend the hearing as he claimed. Insofar as his fitness to attend the hearing is concerned, the letter was no more than a reflection of the appellant's instructions that he did not "feel" ready to attend. Nor was there any adequate time estimate within which it was anticipated the appellant would be well enough to attend. The letter suggests rather speculatively only that he "may be

more resilient to engage with the appeal process in a few months." Perhaps he would not. The GP letter does not indicate that the appellant was so unwell as to be unable to give instructions or to prepare and sign a witness statement in response to the refusal decision.

11. In the circumstances, the medical evidence did not adequately support the application so that even had it been seen and considered by the judge I am satisfied that as drafted it would have made no difference to the refusal to adjourn. Moreover, I am satisfied the GP letter did not in any way excuse the lamentable failure of appellant's representatives to attend the hearing, merely assuming that the repeated adjournment request would be granted because of inclusion of the letter.
12. I make clear that no fault is attributable to the First-tier Tribunal Judge's decision to proceed in the appellant's absence. The judge had to bear in mind that fairness applied to the respondent as well as to the appellant, and the case could not be allowed to drag on indefinitely with no indication as to when the appellant might feel fit to attend.
13. However, I must bear in mind that this was a protection claim with the prospect of the appellant being returned to Bangladesh, where he claimed a fear of persecution or serious harm, so that his life or well-being may be put at risk. Although the judge had an outline and indication of the appellant's case from the respondent's bundle, the evidence was effectively all one-sided, without the appellant's explanation in response to the refusal decision and without being able to hear from and assess the credibility of the appellant and his account.
14. Very fairly, Mr Tan did not resist the appeal on behalf of the appellant, given the explanations provided and the possibility that the appellant was genuinely too unwell to attend the appeal hearing on 3.9.19, even though the GP was inadequate to demonstrate that he was unfit to attend.
15. In fairness, despite the criticisms made above and from which I do not resile, I am satisfied that the appellant should be afforded a fair opportunity to present his case to the First-tier Tribunal and that a decision made without that opportunity was and would be procedurally unfair and, therefore in error of law. He must ensure that those representing him have full instructions, including a witness statement and appellant's bundle, and that he attends the hearing, whether or not he feels able to give oral evidence.
16. In the circumstances and for the reasons set out above, I find a material error of law in the decision of the First-tier Tribunal and set it aside to be remade de

novo. Consistent with the Practice Direction, the appropriate venue to remake this decision is in the First-tier Tribunal.

### **Decision**

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The making of the decision in the appeal is remitted to the First-tier Tribunal at Taylor House with a time estimate of 3 hours.

The appellant must confirm with the First-tier Tribunal the number of witnesses to give oral evidence and whether any interpreter is required.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 21 May 2021

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 21 May 2021

