



IAC-AH-SC/DH-V2

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

Appeal Number: AA/08520/2014

THE IMMIGRATION ACTS

Heard at Field House

On 8 April 2015

**Decision & Reasons
Promulgated
On 18 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CH

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer

For the Respondent: Mr M Htike, Mount Azure Solicitors

DECISION AND REASONS

**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 their 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.

1. The respondent is a citizen of Burma and her date of birth is 15 March 1989. I shall refer to the respondent as the appellant as she was before the First-tier Tribunal.
2. The appellant made an application for asylum and her application was refused by the Secretary of State in a decision of 7 October 2014. The basis of the appellant's claim is that she is of Rohingya ethnicity and a Muslim and her activities in Burma and Malaysia. Her evidence is that her brother was killed by Buddhist monks. The appellant collected money for Muslims in Burma whilst she was in Malaysia and these funds were sent to her mother who distributed them. The appellant was reprimanded by the police in June 2013 for taking photographs of damaged houses and mosques. Her mother has been asked to attend the police station to answer questions in relation to the appellant's whereabouts and demonstrations outside the Burmese Embassy in the UK. She joined the Burmese Muslim Association (BMA) on 3 May 2014.
3. The Secretary of State refused the application. It was not accepted that she is of Rohingya ethnicity. It was not accepted that she was politically active in Malaysia or Burma. It is not accepted that the appellant's mother was summoned by the police in April 2014. It was not accepted that the appellant has been engaged with political activities in the UK before she made an application for asylum.
4. Judge of the First-tier Tribunal Metzger allowed the appellant's appeal on asylum grounds. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Lever in a decision of 6 December 2015. Thus the matter came before me.

The Decision of the First-Tier Tribunal

5. The matter was listed for a CMHR on 5 November 2014 when it was listed for a substantive hearing on 10 December 2014. On this occasion the Presenting Officer who was expected to attend the hearing was unwell and the Presenting Officer who was standing in had insufficient time to prepare the case. The matter was adjourned until 23 December 2014 and Judge C J E Nichols indicated that the matter was to be treated as 'part-heard' and listed before him. The matter came before Judge Metzger on 23 December 2014 who decided to hear the appeal as it was clear that Judge Nichols had not heard evidence.
6. Judge Metzger recorded in the decision at [2] that the appellant gave evidence with the assistance of a Burmese interpreter. In addition he heard evidence of Kyaw Soe Win, an official representative of the BMA. The judge found that the appellant was "wholly credible" at [28]. And he went on to allow the appeal for the reasons that he gave at [28] - [35].

The Grounds Seeking Permission to Appeal and Oral Submissions

7. The grounds seeking leave to appeal maintain that the judge was wrong in recording that the appellant gave evidence with the assistance of a Burmese interpreter. The interpreter had been released and the judge confirmed at the start of the hearing that the appellant could speak English and proceeded. The appellant gave evidence in English not Burmese. The judge stated that he wanted cross-examination to be limited to specific matters particularly since the appellant's English was not good. It is submitted that if the judge took the view that the appellant's English was not good enough for her to be cross-examined in full then her evidence should not have been taken in English. It is submitted that the Secretary of State did not have the opportunity to effectively cross-examine the appellant. To this extent there was a procedural irregularity leading to unfairness.
8. Ms Holmes referred to the Presenting Officer's note which was attached to the grounds seeking permission. The note is dated 23 December 2014 and was prepared by Ms Butt who represented the Secretary of State before Judge Metzger. It is noted that the interpreter had been released and the judge confirmed that the appellant could understand some English and proceeded to hear the case. The following is also noted:-

"He wanted to limit the cross to only specific matters particularly since her English was not that good. I told the Judge even if he found her credible this was a two stage test in that he had to find that she was at risk of persecution. It was evident that the Judge found the app credible. The Judge did not seem so concerned about the lack of evidence on the part of the app or her witness. The app brought a witness Kyaw Soe Win and the Judge asked me what I need to ask him. I replied that I need to put to him if he had supplied any evidence to corroborate his assertions in his witness statement, the Judge said that obviously he could not provide anything. As this was evident I declined to cross-examine him. I have placed my final submissions below as I think the Judge may allow this appeal based on her credibility and his poor handling of the hearing so it can be appealed."
9. Mr Htike relied on his handwritten note that he made at the hearing before the First-tier Tribunal and the Rule 24 response. His handwritten note comprised one page and recorded that the appellant adopted her written statement as evidence-in-chief. Reference is then made to the HOPO and a number of issues are listed representing the cross-examination of the appellant (not in a question and answer form).
10. The Rule 24 response states as follows in relation to the issue raised in the grounds seeking permission.

"12. Taking everything into consideration, the good Judge M Metzger asked CH if she could speak English to a reasonable standard for the hearing to proceed. She explained that she could understand and speak English quite well, but she originally asked for an interpreter because she lacked self-confidence to express herself in English solely. She confirmed that she believed that she could perform reasonably well without an interpreter."

13. CH attended part of her master degree course in Malaysia which was taught in English, and she studied the remainder of her master degree course in the UK, and achieved the master degree awarded by the UK university. Even by the usual standards applied by the Home Office, she could easily be regarded as a person with good English.”
11. At [14] of the Rule 24 response it is asserted that the Judge and the Home Office Presenting Officer asked the appellant a large number of questions regarding issues listed at [1] - [15].
12. It is asserted at [16] of the Rule 24 response that the parties decided to go ahead without an interpreter and that the appellant did not “feel an iota of distress or difficulty during the hearing. She did not feel at all that she was forced to proceed with the hearing without an interpreter. During the hearing there was no complaint or objection by the Home Office Presenting Officer against the hearing going ahead without an interpreter.” It is asserted at [18] of the Rule 24 response that the Secretary of State’s allegation that the Home Office Presenting Officer was prevented at the hearing from effectively examining the appellant was “either wrong or exaggerated or both”. At the conclusion of evidence the Judge advised both parties to make focused submissions but he did not prevent either party from making submissions.
13. In oral submissions Ms Holmes argued that the cross-examination of the appellant recorded in the determination is not very detailed and this supports the assertion that it was limited. The Rule 24 response does not respond directly to the issue raised in the grounds. Ms Holmes referred to [14] and argued that it did not reflect cross-examination.
14. Mr Htike made oral submissions in the context of the Rule 24 response. He submitted that the interpreter was not released by the judge. She left the hearing in error. The interpreter had been booked at the request of the appellant, but the appellant did not want an adjournment considering the history of the appeal. The Presenting Officer did not raise an objection to the hearing proceeding. The judge did not limit cross-examination he asked both parties to focus on the issues.

Error of Law

15. I am satisfied that the judge limited cross-examination by the Presenting Officer on account of the appellant’s lack of English language skills and this amounts to a procedural irregularity. There was originally a Burmese interpreter at the hearing and whether she was released by the judge or left on her own accord is not in my view material. There is a material irregularity which amounts to a material error of law and the decision of Judge Metzger is set aside pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
16. Unfortunately the Record of Proceedings is not helpful. There is no witness statement from the Presenting Officer or indeed Mr Htike who in fact represented the appellant at the hearing before me as well as the

hearing before the First-tier Tribunal. It is accepted by both parties that there was no Burmese interpreter at the hearing and that the appellant gave evidence in English which is at odds with the judge recording that the appellant gave evidence with the assistance of a Burmese interpreter. This is a clear factual error.

17. The judge limited cross-examination because of the appellant's language difficulties (which became apparent as she gave evidence). It may be that the judge asked the parties to focus on relevant issues in relation to submissions but in my view he went further than this in relation to cross-examination. I accept that the appellant was cross-examined and there is indeed a record of cross-examination at [17] - [24]. However I do not accept that cross-examination was as extensive as asserted by the appellant in the Rule 24 response at [14] (which in any event fails to distinguish between questions asked by the Judge and cross-examination.) I have taken into account the note of the hearing produced by Mr Htike which supports the assertion that the appellant was indeed cross-examined but it does not deal with the issues raised in the grounds of appeal namely whether or not this was limited by the judge.
18. It is regrettable that there was no application for an adjournment made by the appellant who had originally requested an interpreter (notwithstanding the unfortunate history of the case and the likely length of an adjournment). It is also regrettable that the Presenting Officer did not object to the judge's intervention in relation to cross-examination. However, there is a clear material irregularity which amount to a material error of law.
19. Both parties agreed that the matter should be remitted to the First-tier Tribunal pursuant to Section 12(2)(b)(i) having taken into account paragraph 7 of the Practice Statement of the IAC of the FtT and UT of the Senior President of Tribunals 25 September 2012.
20. The appellant submitted a supplementary bundle at the hearing before me. This was not material to the error of law decision. Whether or not it is admissible in relation to the substantive hearing is a matter for the First-tier Tribunal.
21. I have made an anonymity direction in the light of the nature of the appellant's evidence. I did not hear representations from either party on the issue which may be reviewed by the FtT at the substantive hearing.

Signed Joanna McWilliam

Date 15 April 2015

Deputy Upper Tribunal Judge McWilliam