



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

Appeal Number: AA/02179/2015

THE IMMIGRATION ACTS

Heard at North Shields

On 17th March 2016

**Decision &
Promulgated
On 18th July 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

**MR. HOSSEIN IRAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rasoul of Counsel, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr. J Kingham, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision and reasons promulgated by First-tier Tribunal Judge Trotter on 14th April 2015, in which he dismissed an appeal against the decision of the Secretary of State for the Home

Department to refuse to grant the appellant asylum and to remove the appellant from the UK by way of directions under s10 of the Immigration and Asylum Act 1999.

Background

2. The appellant is an Iranian national who claims to have left Iran on 26th September 2014. He claims to have travelled in four lorries during the course of his journey to the UK, but is not aware of the countries through which he travelled. The appellant was found in the back of a lorry on 9th October 2014 and was served with Notice of his liability to detention and removal. The appellant claimed asylum.
3. A screening interview was completed on 14th October 2014 and that was followed by a full interview on 16th January 2014. On 23rd January 2015 a decision was made by the respondent to refuse to grant the appellant asylum and it was that decision and the decision to remove the appellant from the UK, that gave rise to the appeal before the First-tier Tribunal.

The decision of the First-tier Tribunal

4. The appellant attended the hearing of his appeal before the First-tier Tribunal. He was not represented. The Judge sets out the background to the appeal before him and the evidence given by the appellant at paragraphs [1] to [11] of his decision. At paragraph [1] the Judge states:

“1.the Appellant is a citizen of Iran who was born in September 1996 and who after having engaged in subversive activities against the Iranian state left Iran on the 9 September 2014 arriving in the United Kingdom on the 26 September of the same year...”

I highlight that brief chronology at this point because the appellant in fact claims that he left Iran on 26th September 2014. He was found, according to the respondent's decision refusing his claim for asylum, in the back of a lorry by Suffolk & NE Essex Lit Arrest team on 9th October 2014.

5. The Judge records in his decision the account given by the appellant of events in Iran, as set out in the screening interview and the substantive interview. At paragraphs [2] to [4] of his decision, the Judge refers to the appellant's claim to have been a student activist and to the incident in June 2009 when the appellant was detained and released after 2 days, having been involved in a demonstration. Between paragraphs [3] and [9] of the decision, there are several reference to the appellant's activities in Iran following his release in June 2009. At paragraph [5], the Judge refers to the appellant's brother having paid for the appellant to leave Iran.
6. The Judge's findings are to be found at paragraphs [12] to [17] of his decision. The findings are encapsulated at paragraph [16] of the decision, and at paragraph [17] the Judge found that the appellant will not suffer any risk of ill treatment on his return to Iran, save and except such risk as is borne by an individual who has left Iran without his passport.

The appeal before me

7. The appellant advances three grounds of appeal. The first and third grounds can be taken together. First, it is said that the appellant requested an adjournment in order to find representation due to the complexities of his case, but that request for an adjournment was refused by the Judge. It is said that the appellant's previous representatives ceased acting for him only a few days before the hearing of the appeal, leaving the appellant with no time to secure alternative representation. The lack of representation meant that the

appellant was unable to properly and adequately articulate all of his reasons for seeking protection. Second, the appellant submits that the decision displays a factual misunderstanding of the appellant's case. The appellant submits that his claim and fear of persecution follows the raid on his family home in 2014 and the Judge failed to give any consideration to that aspect of his claim. The appellant submits that it was following the raid on the family home in 2014 that the appellant's family were marked for observation and not after the appellant's arrest in 2009. It is submitted that the Judge fails to address the raid upon the family home in 2014, in his decision.

8. Permission to appeal was granted by First-tier Tribunal Judge Wellesley-Cole on 24th June 2015. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Trotter involved the making of a material error of law.
9. The respondent has filed a Rule 24 response in which she confirms that the appeal is opposed. The Rule 24 response includes an extract from the notes of the Presenting Officer that appeared on behalf of the respondent at the hearing of the appeal before the First-tier Tribunal. The extract states:

"Before the IJ entered the appellant asked if it was possible to have a solicitor. This was mentioned to the IJ who checked with the appellant the circumstances of not being represented and obtained confirmation he (sic) was happy to proceed. The IJ allowed the appellant to add to his interview and during cross examination asked about the summons and journey to the UK (route and funding)."

10. On behalf of the appellant, Ms Rasoul adopts the matters set out in the Grounds of Appeal and submits that the appellant had previously been represented but his previous representatives only ceased to act on his behalf, a few days before the hearing of his appeal before the First-tier Tribunal. She was unable to confirm when it was that his previous

representatives, had ceased to act on behalf of the appellant. She maintains that the Judge appears to have misunderstood the factual basis of the appellant's claim and the fact that the appellant was not represented at the hearing, contributed to the confusion and the Judge's misunderstanding of events.

11. In reply, Mr Kingham adopts the matters set out in the Rule 24 response. He submits that there is no evidence of any application for an adjournment having been made by the appellant, and there was no evidence that the appellant would have been able to secure representation even if the matter had been adjourned. He submits that a careful reading of paragraph [16] of the decision demonstrates that the Judge gave the appellant every opportunity to explain his case, and that it was open to the Judge to reach the findings that he did. Mr Kingham concedes that the Judge does not appear to have considered the appellant's evidence about the raid on the family home in 2014 that led to the appellant's departure from Iran.

Error of Law decision

12. There is no reference in the decision of the First-tier Tribunal Judge to any application for an adjournment having been made by the appellant. The appellant was unrepresented. It is clear from the brief extract of the Presenting Officer's notes of the hearing that there was at least some discussion, it seems prior to the hearing being called on, between the appellant and the Presenting Officer as to whether it might be possible for the appellant to have a solicitor. Quite rightly, the Presenting Officer appears to have drawn the Judge's attention to that discussion and there then appears to have been some exchange between the appellant and the Judge. The Presenting Officer recorded that *"....the IJ checked with the appellant the circumstances of not being represented and obtained confirmation he (sic) was happy to*

proceed....". It is by no means clear whether the appellant did in fact make an application for an adjournment.

13. The issue of fairness in the context of adjournments was considered by the Upper Tribunal in the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 418**. The President gave the following reminder;

"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 considerations 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.

8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [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".

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. 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. I am conscious, of course, that 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. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. 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 applications for adjournments, Judges will also be guided by focusing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

14. I have some sympathy with the submissions made by Mr. Kingham. Even now, Ms. Rasoul was unable to tell me when it was that the appellant's previous representatives had told him they would not represent him at the hearing before the First-tier Tribunal. If there was an application to adjourn, the application to adjourn was not made at the earliest opportunity, but left to the morning of the hearing before the First-tier Tribunal. The application was speculative, and in the absence of any confirmation from the appellant's representatives, there was no reasonable basis to presume that the appellant would be able to secure representation at a future hearing.
15. Had an application for an adjournment been made and the reasons for refusing the application been set out in the decision, one would know the reasons why the Judge refused the application. There was plainly some discussion between the Judge and the appellant but there is no reference in the decision to what it was that the appellant was seeking. Having raised the possibility of being represented, there is no

clarification as to why it was that the appellant confirmed that he was happy to proceed without representation. If there was no formal application made by the appellant, it would appear that the Judge did not even consider the option of an adjournment, given that there was at least some discussion between the appellant and the Judge about the lack of representation at the hearing of the appeal. There appeared to be representatives recorded as acting on behalf of the appellant on the Tribunal record previously.

16. I remind myself that the decision in **Nwaigwe**, makes it clear that the crucial question is not whether the decision of the First-tier Judge was reasonable, but whether the refusal deprived the appellant of his right to a fair hearing. There are at least two references in the decision of the Judge of the difficulties that he faced in dealing with this appeal because of the lack of representation. At paragraph [1] the Judge states:

"1.The nature of the appellants case as set out in those documents (and it is in my view regrettable that there is no overarching statement made on behalf of the appellant's representatives did not produce one) is to the effect that the appellant is a citizen of Iran who was born"

At paragraph [16] the Judge states:

"16. I have to look at this matter as a whole bearing in mind the lower standard of proof and handicapped (in my view) that I have been by the fact that the appellant was not represented..."

17. From a careful reading of the decision, it is not entirely clear that the Judge properly understood the factual matrix for the appellant's claim. As Mr. Kingham concedes, the Judge makes no adequate and clear reference in his decision to the event that caused the appellant to flee Iran. That is, the raid upon the family home on 25th September 2014, when the appellant was at school. The failure to deal with that event is

in my view compounded by what appears to be a misunderstanding as to the chronology. As I have set out, at paragraph [1] of his decision, the Judge records that the appellant left Iran on 9th September 2014 and arrived in the UK on 26th September 2014.

18. In my view the judge erred in not granting an adjournment and because of that refusal to grant an adjournment, the appellant was left unable to properly articulate his claim. In my judgement, it is not entirely clear that the Judge properly understood the factual basis of the appellant's claim. In the circumstances, I am not satisfied that the Judge took account of all material considerations in his decision, and I am satisfied that the appellant did lose his right to a fair hearing.
19. I therefore conclude that the decision of the First-tier Tribunal must be set aside.
20. I have taken into account paragraph 7 of the Senior President's Practice Statement of 25th September 2012 and decided that it is appropriate to remit this appeal to the First-tier Tribunal because of the extent of judicial fact-finding which is necessary. The parties will be advised in writing of the date and time of the hearing. The appeal is to be heard de novo and no findings are preserved.

Notice of Decision

21. The appeal is allowed. The decision of the First-tier Tribunal promulgated on 24th April 2015 is set aside and I remit the matter for a de novo hearing in the First-tier Tribunal.
22. No anonymity direction is applied for and none is made.

Signed

Date **18th July 2016**

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award, and whether or not a fee award is appropriate, is again a matter for the First-tier Tribunal in due course.

Signed

Date **18th July 2016**

Deputy Upper Tribunal Judge Mandalia