



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

Appeal Number: PA/02834/2015

**THE IMMIGRATION ACTS**

**Heard at Liverpool  
On 21 April 2017**

**Decision & Reasons Promulgated  
On 15 May 2017**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**S A  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mrs B Faryl, Counsel, instructed by Immigration Advice Service

For the Respondent: Mr A McVeety, Home Office Presenting Officer

**DECISION ON ERROR OF LAW**

1. The appellant, who claims to be a Palestinian, has permission to challenge a decision of First-tier Tribunal (FtT) Judge Herwald sent on 13 January 2017 dismissing her appeal against a decision made by the respondent on

26 November 2015 refusing her asylum and humanitarian protection claims.

2. The sole ground of challenge is to the judge's refusal to adjourn the hearing despite the evident physical distress of the appellant. It will assist to set out the judge's reasons for refusing to adjourn at paragraphs 3-5:

"3. The Appellant chose to give evidence without an interpreter, although one had been booked. As her cross-examination progressed, she appeared to be struggling slightly with some English, and at Ms Faryl's request, the interpreter was asked to step in. The Appellant continued to answer questions in English, and although I was prepared to allow her to choose to do so, Ms Faryl wisely advised her that she should go through the interpreter at all times. At 10.40am I stood the case down for some time, as the Appellant appeared to be vomiting. Thereafter the case resumed. I stood the matter down at 11.05am and allowed time for the Appellant to give evidence. Her representative returned to court to say that 'a psychologist who has accompanied the Appellant says that she is in shock and ought not to proceed'. I stood the matter down and Ms Faryl came back into court at 12.50pm. She said that the Appellant would not return to court and asked me either to agree to adjourn the hearing, or to order that the hearing be aborted, and begun again in front of an all female court.

4. Mr Jaffri opposed this application. He pointed out that the Appellant had just about concluded cross-examination. He told me what two further questions he would have wished to ask, and I opined that those particular questions would not assist me in the decision making process. Ms Faryl had already indicated that she would only 'possibly' have some re-examination. I took into account the inordinate delay at present involved if one adjourns an asylum hearing, and I shared with the parties that a resumed hearing might not take place until the middle of 2017, which could not be in the interests of a nervous Appellant. I reminded myself that the case had had to be adjourned before, due to the Appellant's medical state and that it looked as though I had heard sufficient information in order to enable me to make a decision in this case. Ms Faryl had opined that it might not be safe to rely on the evidence thus far heard, considering that her client appeared to be retching and was not now well enough to come into court again.

5. That said, I announced that we would move to hearing submissions, whereupon the Appellant reappeared, with the psychologist in tow, (She had made a statement but who was not being called to give evidence). The Appellant sat down once again in the seat reserved for the Appellant, and took part once

again in the proceedings. There was no further cross-examination or re-examination, but the Appellant was invited by me to share any further thoughts that she wished in relation to her claim. She went on to make a speech about why her asylum claim should be allowed, and why she had fled Jordan. This was with the tacit agreement of the psychologist, who said she had no objections medically, to the question posed. The Appellant then remained for final submissions. Although Ms Faryl had said that she would only rely on the skeleton argument, and not make a speech, she appeared to decide, in the presence of the Appellant, that she could make detailed oral submissions”.

3. I heard submissions from both representatives and express my gratitude to them for their clarity.
4. I am persuaded that the ground of appeal is made out. I have some sympathy for the position the judge found himself in. I also think that when the appellant became ill the judge did try to proceed fairly, by putting the case back to allow time for the appellant to complete her evidence and then taking stock of the fact that the appellant had just about concluded being cross-examined. However, there are two considerations which lead me to conclude that the judge was wrong to refuse to adjourn. First, the judge does not appear to have understood that the appellant was a vulnerable witness within the meaning of the Joint Presidential Guidance Note No 2 of 2010. That had been attested to by medical evidence that was before the judge from both a psychotherapist and a mental health practitioner. Both practitioners had identified that the appellant suffered from PTSD, anxiety and depression and when asked about the matter of her claim to have been the victim of a sexual assault she was someone who became very distressed and physically agitated. Whilst it can be said that the judge did make certain allowance when the appellant became physically sick (vomiting three times), by then standing the case down for a short period, he appears to have assumed that the appellant’s evidence had been unaffected up to the point when she became sick. In my judgment, in view of the medical evidence, that was an unsafe assumption, since the medical evidence indicated that the appellant was likely to find the business of giving evidence distressing.
5. I am also concerned about the judge’s stated assumption that the psychologist, Ms Bell, who had been in the hearing room and had earlier said the appellant was in shock and not ready to proceed, condoned the appellant coming back after the break and making a statement. The judge records at paragraph 5 that this “was with the tacit agreement of the psychologist who said she had no objections medically to the question posed”. That is at odds with the record presented by the Home Office Presenting Officer who simply records that the psychologist advised the appellant’s representative that the appellant could not continue. It is not clear why the psychologist, having said the appellant could not continue,

should shortly after approve the appellant making a statement in answer to a question asked by the judge.

6. Compounding my concerns about the judge's treatment of the medical evidence is the fact that later on in the determination, when assessing the substance of the appellant's account, the judge states that the two written medical reports could only be accorded "very slight" weight because they were "entirely based on self-reporting". I find this an oversimplification of what the two experts concerned were doing when they gave their reports. Both had examined the appellant and both through training would be highly unlikely to base their assessment "entirely" on the appellant's own description of her psychological condition. That is not to say that their reports were above criticism, simply that they should not have been misunderstood.
7. Mr McVeety submits that he would not have opposed the appeal save for the timing of the problem that arose. By the time the appellant became physically sick, he pointed out, she had virtually completed her evidence and the judge gave an entirely reasonable explanation for why he did not press the appellant to complete cross-examination. The difficulty with this submission is the same as I identified earlier. It was an unsafe assumption to be made, in respect of a vulnerable witness, that her vomiting was not simply an extreme manifestation of the fact that the appellant was anxious and distressed throughout the course of giving evidence. Indeed later on, when considering the substance of the appellant's claim, the judge acknowledged at paragraph 17(l) that "the appellant may have been stressed by the court appearance". It is not clear to me that the judge made any allowance for that.
8. True it is that the appellant's case had been adjourned once before due to the appellant's medical state. True it is also that by adjourning the judge would cause further delay. But the judge who previously adjourned had not forewarned the appellant that if she could not give evidence for medical reasons again, the Tribunal may well rely solely on her written evidence.
9. For the above reasons I conclude that the judge erred in failing to adjourn the hearing and as a result his decision must be set aside.
10. I consider that in light of the procedural unfairness that took place, no findings of fact made by the FtT can be preserved and that the case should be remitted to the FtT.
11. However, in view of the history of adjournment for medical reasons, the appellant must understand that if she is, once again, unable to give or complete her oral evidence, the FtT will proceed to determine the case on the basis of her written evidence (which it is open to her to add to if submitted ten days prior to the next hearing) and submissions.

12. To facilitate the prospect of the appellant being able to give oral evidence next time in conditions liable to minimise stress, I shall direct that the hearing take the form of an all female court – so that both the representatives, the interpreter and the Tribunal judge(s) are female. Whilst I am somewhat troubled by the fact that in her asylum interview the appellant did not voice any concerns about a male interpreter, I note that Ms Bell has stated her medical opinion that the appellant’s PTSD level is very high near men and that a request for an all female court was made at the hearing before Judge Herwald. I shall also direct expedition.

13. For the above reasons:

The FtT materially erred in law and his decision is set aside.

**Direction**

The case is remitted to the FtT to be heard by an all female court.

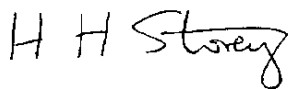
The case is to be put before a resident judge with a view to as early listing as is practicable.

**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.

Signed

Date: 12 May 2017



Dr H H Storey  
Judge of the Upper Tribunal