Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04278/2017

THE IMMIGRATION ACTS

Heard at	**Decision & Reasons Promulgated**
On 31st July 2017	**On 9th August 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Fitzimmons, Couinsel instructed on behalf of the Appellant

For the Respondent: Mr P. Singh, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Vietnam.

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Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

2. 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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who in a determination promulgated on the 5th June 2017 dismissed his claim for protection. The Appellant's immigration history is set out within the determination at paragraphs 1-4 and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows. The Appellant arrived in the United Kingdom on the 31st October 2014 concealed in a lorry and claimed asylum. He was aged 16 and was therefore placed in local authority care. He absconded and therefore on the 13th February 2015 his claim was treated as abandoned. He was encountered on an enforcement visit on the 9th February 2017 at an establishment and denied working or that he was a victim of trafficking. He underwent a substantive interview on the 7th April 2017 and a Rule 35 report was written. Further representations were received from his solicitors. On the 20th April 2017 the Competent Authority wrote to the Appellant setting out reasons as to why it was not considered that he was a victim of trafficking and a decision letter was issued by the Secretary of State on the same day in which his application for asylum was refused.

4. The basis of the Appellant's protection claim is recorded in the decision of the First-tier Tribunal at paragraphs [18 to [24] which is also referred to in the detailed reasons for refusal.

5. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 26th May 2017.

6. The judge set out his findings at paragraphs [34] to [58]. The Appellant sought permission to appeal that decision and the grounds are set out in the papers.

7. The FTT (Judge Bird) granted permission to appeal on limited grounds and effectively only granted permission on ground 3 which related to the credibility findings which had arisen and made reference to at paragraph 42 of the determination.

8. At the hearing before this Tribunal Miss Fitzimmons, who had not drafted the grounds, submitted that she did not seek to advance ground three. That was a ground which challenged the judges credibility findings as to what had happened when the Appellant was encountered and whether or not there was an interpreter present on the telephone (see paragraphs 27 to 32). In particular at paragraph 31 it was asserted in the grounds that the judge made an assumption that "big word" was used and thus the

Appellant had an interpreter. She directed the Tribunal's attention to set out in the respondent's bundle at A1 which was a copy of the CID note dated 9 February 2017 where it was set out that the Appellant "stated with the use of a big word interpreter that he had entered the UK in October 2014….". In those circumstances she submitted that ground three could not be advanced. However she submitted that the grounds of appeal originally had numbered three particular grounds. Ground one related to procedural unfairness and the second ground related to the identification of the Appellant as a victim of trafficking. The grant of permission by Judge Bird was a limited grant and appeared to grant permission only on ground three which was now not being proceeded with. She therefore sought to rely upon the original grounds as drafted by Counsel at the hearing relying on grounds one and two. In this respect she provided a copy of the decision in Ferrer (limited appeal grounds; Alvi) [2012) UKUT 00304(IAC). However it was unnecessary to hear any further submissions in this respect as Mr Singh, on behalf of the respondent, indicated that he had no objection to Counsel advancing grounds one and two. He was able to deal with those aspects and it did not cause any difficulties. As the parties were in agreement with the course to be adopted, I heard submissions from each of the parties relating to both grounds one and two only.

9. I have therefore considered ground one in the light of the submissions that I have heard from both parties and by reference to the written documentation including the submissions made by Miss Fitzsimmons and the rule 24 response provided on behalf of the Secretary of State dated the 12th July 2017. In that response it states that at paragraph 17 the judge gave adequate reasons for refusing the adjournment request and to do so was not procedurally unfair to the Appellant. There are no reasons given as to why it was not "procedurally unfair" or otherwise. In his oral submissions Mr Singh submitted that the judge gave his reasons at paragraph 17 having considered the basis upon which it was put in the preceding two paragraphs. Whilst the grounds make reference to the judge misunderstanding the submissions, there was no statement from that Counsel in the papers thus the judge properly considered the basis of it. He submitted there was country evidence before the judge as indicated by DIJ woodcraft who had refused the application for an adjournment prior to the hearing. There had also been an assessment of the issue of trafficking in the negative reasonable grounds letter and the refusal letter. Thus it could not be said that there was no consideration of his claim.

10. Whilst the application also made reference to a psychological/medical report, he stated that he had been fit and well to be interviewed and therefore as the judge stated it was "speculative". Therefore there was no procedural unfairness.

11. Having had the opportunity to consider the submissions from the advocates in the light of the determination and the issues raised, I have reached the conclusion that the Appellant has demonstrated that ground one is made out. In those circumstances it is not necessary for me to make any further reference to ground 2 although the result of finding an error of

law on the basis of a procedural irregularity will have the effect of the issue of whether he is a victim of trafficking to be revisited in the light of the expert evidence assembled on his behalf.

12. I shall therefore set out my reasons as to why have I have reached that conclusion.

13. When considering this ground I have had the opportunity to look at the Tribunal file which set out the previous applications made for an adjournment. I took the parties through these documents as they would not have had an opportunity to have seen them. I read those previous applications within the timetable for this Appellant's hearing. It is common ground that on 4 May 2017 he lodged grounds of appeal and the hearing of his appeal took place on 26 May thus there was a period of approximately 22 days from the lodging of the appeal to his final hearing. It is also the position that he was in detention and whilst his solicitors had raised the issue that this, being a case of a possible victim of trafficking, and was thus not suitable for detention, he remained there. The difficulties with the process of such claims has been the subject of litigation in the High Court (and the Court of Appeal). It is not necessary for me to make any further reference to that litigation. Nonetheless, it forms the backdrop to this particular appeal.

14. Furthermore because of the time constraints it appears that there had been no prehearing case management review therefore issues relating to missing evidence or clarification of the respondents evidence (in this regard the CID note which was the subject of some discussion during the hearing) or the importance of expert evidence did not take place.

15. The first application made on behalf of the Appellant was made on 18 April and is set out in the respondent's bundle at E2. Whilst Miss Fitzsimmons referred to it as an application for an adjournment it was not strictly such an application and indeed it was not treated as an adjournment request but as further representations. In that letter it was made plain to the Secretary of State that further documentary evidence was required to be collated before reaching a decision on the asylum claim itself which included a medicolegal report and a scarring report. Those reports were considered to be relevant before the decision was made and reference was made to the rule 35 report. At this stage there had been no update from the competent authority as to whether or not he was indeed a victim of trafficking. That being the case, the letter made it plain that in the circumstances it was not a case suitable for the DAC procedure. It does not appear that any request was acted upon and indeed the chronology demonstrates a refusal letter was issued on 21 April 2017 after those representations.

16. The first real application for an adjournment before the Tribunal was made on 15 May there does not appear to be a copy of the letter sent on the Tribunal file but reference was made to it in a letter from the Appellant's solicitors renewing their application for an adjournment in a letter dated

19 May 2017. It records that the earlier adjournment request was refused because “the case for an expert report has not been made out.”

17. The second request came in a letter dated 19 May 2017 which was in essence a renewal of the application that had been refused. The expert evidence that was required was that of a trafficking expert report which was deemed necessary to assess the Appellant’s background and to address the negative reasonable grounds decision. It was submitted that it was a report necessary to address the issues that had been raised in the negative decision and to give further analysis from the Appellant’s viewpoint as to whether he was a potential victim of trafficking. The second report related to a country expert and this appears to be on the basis of a report to address risks of re-trafficking upon return. The letter made it plain that “the Appellant’s matter is covered by legal aid and we have funding to cover the costs of the expert.” Thus there were no funding issues at the time of that application although as I stated to Counsel, there was no indication on the file that a letter of instruction had been provided along with the application.

18. That application was refused on 22 May 2017, four days before the hearing. The reason given was “the issue is the credibility of the Appellant and the instruction of two or more experts appears speculative. In any event there is ample background material on Vietnam already.”

19. Thus the hearing came before the first Tier Tribunal. The judge dealt with the preliminary issue of an adjournment, which properly had been renewed orally before the judge, at paragraphs 14 to 16.

20. At paragraph 14 the judge made reference to the previous adjournment to which I have just referred. Paragraph 15 set out the basis of the submissions made on behalf of the Appellant. It is clear from that paragraph as Ms Fitzsimmons submitted, that a country expert report was required on the issues of trafficking and that the Appellant’s account needed to be subject to expert analysis. It was also asserted that a medical report was necessary to deal with the mental health issues. At paragraph 16, it records the submissions made on behalf of the presenting officer. It is this paragraph that is the subject of discussion in the grounds for permission to appeal. Couinsel who was present at the hearing and who had made that application for an adjournment also settled the grounds of appeal. At paragraph 14 of those grounds, it was asserted that the first Tier Tribunal had made a mistake at paragraph 16 when it was recorded that the “funding would be in place within 2 to 3 weeks”. What the grounds say is that this was a mistake and that the expert needed 2 to 3 weeks to complete the report and for it to be served on the parties. An expert had been approached (the name of the expert had been given) and funding was in place.

21. As Mr Singh submitted, there was no witness statement from Counsel who was involved. Miss Fitzsimmons had not drafted the grounds and there was no further information from Counsel who had been present at the

hearing. I also asked Miss Fitzsimmons whether she had any evidence from her instructing solicitors concerning any correspondence with the expert identified but she did not have any evidence with her at the hearing. Nonetheless, there is no reason to disbelieve Counsel's assertion at paragraph 14 of the grounds that there appears to be a mistake or misunderstanding as to the factual basis of the adjournment at paragraph 16 of the determination. The earlier correspondence that I have referred to made it plain that funding was in place and therefore the submission recording that the correct funding would be in place within "2 to 3 weeks" is not consistent with the earlier letter of 19 May. I therefore approach the question of the adjournment on the basis that there had been a misunderstanding as to the timescales and of therefore considered this issue in accordance with procedural rules applicable and the relevant case law.

22. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding objective is deal with cases fairly and justly. This is defined as including "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues".

23. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held that 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?

24. I also have in mind, of course, what was said by the Court of Appeal in the judgment of Moses LJ in the well-known case of SH (Afghanistan) [2011] EWCA Civ 1284 :
"The principle applicable to the request for an adjournment to adduce evidence on behalf of the Appellant was not in dispute. It is fundamental that the parties should be allowed to answer adverse material by evidence as well as argument (see, e.g., In Re. D [1996] AC 593 at 603) and all the

more so where the subject matter, such as a claim for asylum, demands the highest standards of fairness."(see paragraph 8).

25. As set out earlier in the determination, the timescale between the refusal of his application and the hearing was short indeed. The Appellant was also in detention and therefore for his part, the ability to assemble and provide evidence was limited. Similarly in terms of time, those instructed by the Appellant were also under time constraints. It is not a case whereby they failed to act quickly but that they made applications for further time to obtain material that they thought necessary to advance on behalf of the Appellant his protection claim. The background of the type of claim that was being advanced, which was as a potential victim of trafficking, must also be borne in mind. There had been no provision made for a case management review and therefore issues such as expert evidence had not been ventilated orally before a judge prior to the hearing.

26. The chronology above also indicates that the solicitors had asked for further time to obtain evidence before the reasonable grounds decision had been issued (and also the decision reached by the Secretary of State. However, there does not appear to have been any answer to those representations and the reasonable grounds decision which was negative was made on the same day as the refusal of his protection claim. Thus there had been little time for the Appellant solicitors provide evidence on his behalf dealing with the issues of trafficking and in particular the negative reasonable grounds decision.

27. It is right that the judge did make reference to the country material that he had before him. However there are a number of agreed facts which could be seen as indicative of trafficking. They are as follows; that the Appellant entered the United Kingdom aged 16. He was placed in social services care but went missing from care thereafter. There was evidence before the Tribunal that victims of trafficking do go missing in such circumstances (although other reasons were given), that the Appellant's account of being trafficked is consistent with the background evidence as to the history of trafficking within that country and that between 100 to 200 victims are identified each year and that miners often go missing. He was found working in a nail bar (although he claimed not to be working at that time). This again is a factor and could be seen as supportive of the claim to have been trafficked.

28. Whilst the judge did make reference to the material, in the absence of any report dealing with these issues from the Appellant's perspective, the credibility findings were made in the light of the country materials which were general in content and not specific to this Appellant and the particular facts that he sought to advance.

29. I am satisfied that had it been the position that the reports indicated (both on trafficking and expert country material) would be available in the short span of 2 to 3 weeks that a short adjournment would have provided the Appellant with a fair opportunity to challenge both the reasonable grounds

decision and the credibility findings set out in the decision letter. It was not a long period of adjournment. In my judgement, reasons have been given, when based on the particular factual and chronological background which demonstrates that it would have been in the interests of fairness and justice that such an opportunity to provide the reports was merited and as such may have an impact on the decision making process and the decision reached. I do not consider that the grounds are made out where it is submitted that a psychological report was necessary. There does not appear to be any evidence to demonstrate any basis for such a report. However as I have reached the conclusion that I am satisfied that there was a procedural unfairness, for the reasons set out above, that will be a matter to be considered in due course.

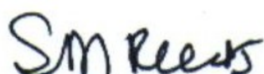
30. As to the remaking of the decision, both advocates submitted that the correct course to adopt in a case of this nature would be for the appeal to be remitted to the First-tier Tribunal because it would enable the judge to consider the Appellant's evidence in the light of the expert evidence provided and for the issues to be determined in the light of all the relevant evidence.

31. In the light of those submissions, I am satisfied that this is the correct course to take and therefore I set aside the decision of the First-tier Tribunal and it will be remitted to the First-tier Tribunal to hear afresh. The Appellant solicitors will be required to provide a timetable for the provision of the expert evidence and should do so by setting those issues out in correspondence and for the first-tier Tribunal to consider whether there should be a case management review.

<u>Decision:</u>

The decision of the First-tier Tribunal involved the making of an error on a point of law and is hereby set aside; it shall be remitted to the First-tier Tribunal for a further hearing.

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. The 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: 4/8/2017
Upper Tribunal Judge Reeds