



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

Appeal Number: PA/08525/2016

THE IMMIGRATION ACTS

Heard at Stoke

On 13th September 2017

**Decision & Reasons
Promulgated**

On 2nd October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

[S M]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohzan, Solicitor

For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Iraq. He was born in 1989, albeit that there is some dispute as to the date within that year. The Appellant claims to have left Iraq on approximately 24th December 2016 travelling by various

means of transport until he arrived in the UK in a lorry whereafter he claimed asylum on 9th February 2016 having been encountered by the UK authorities. His claim for protection was based thereafter on a claim that he would face serious harm and/or be unlawfully killed by non-state agents if he were to be returned to Iraq.

2. The Appellant's application for asylum was refused by the Secretary of State on 2nd August 2016. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Somal sitting at Stoke on 17th February 2017. The Appellant did not appear and that non-attendance forms the whole basis of the current proceedings. He was however legally represented at that hearing. The Secretary of State was not. In a decision and reasons promulgated on 27th February 2017 the Appellant's appeal was dismissed on all grounds.
3. On 6th March 2017 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended that the First-tier Tribunal Judge had failed to exercise her powers granted under the Tribunal Procedure Rules 2014 to ensure that the Appellant had a fair hearing. The judge had acknowledged that an application for an adjournment was made by the Appellant's legal representative that the Appellant have further time to attend the hearing centre. The Appellant's representatives requested an adjournment of around an hour, bearing in mind that the Appellant was travelled via public transport and has a prosthetic leg. The Grounds of Appeal contend that the details of the adjournment request were not accurately reflected in the determination.
4. On 13th June 2017 Designated Judge of the First-tier Tribunal Woodcraft granted permission to appeal. Judge Woodcraft noted the judge's decision to proceed in the Appellant's absence was entirely understandable, particularly given the dubious nature of the case, but that there was difficulty in the distinction made in the case of *Nwaigwe [2014] UKUT 418* between fairness and reasonableness. Judge Woodcraft concluded that the judge's decision to proceed with the case was undoubtedly reasonable but that it was arguable that it was unfair in the light of the Appellant's circumstances.
5. On 4th July 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24, contending that the Judge of the First-tier Tribunal had directed herself appropriately.
6. The matter then came before Deputy Upper Tribunal Judge Pickup sitting at Stoke on 1st August 2017. Judge Pickup noted that whilst the Appellant would have had to travel from his home in Nottingham to the hearing centre in Stoke, the Tribunal had not been provided with any evidence to justify the assertions made. In such circumstances he adjourned the hearing before the Upper Tribunal and gave directions including a direction that not later than ten days after the issue of these directions the Appellant's representatives must provide cogent evidence to support the assertions made in the application for permission to appeal.

7. It is on that basis that the appeal comes before me to determine whether there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed solicitor Mr Mohzan. Mr Mohzan is familiar with this matter, having appeared before Judge Pickup. The Appellant is present. The Secretary of State appears by her Home Office Presenting Officer Mr Bates.
8. I refer to a letter from Burton & Burton Solicitors of Nottingham attaching a witness statement dated 7th August 2017 from the Appellant. That witness statement purports to address the issues required by Judge Pickup when granting the adjournment. From that statement it appears that the Appellant's train had broken down and was stopped for nearly two hours between Nottingham and Derby on its way to Stoke. He was then redirected via Birmingham before arriving at the Stoke centre after 12 o'clock. He stipulates that his late arrival was through no fault of his own and that it was outside his control as he was travelling on public transport. He emphasises within the witness statement that he speaks no English and thus experienced difficulty in communicating his position to the train staff.

Submissions/Discussion

9. Mr Bates submits that whilst the events may well have taken place they are not material to the outcome of the decision and that there was nothing that the Appellant could have said that would have led to a different finding by the First-tier Tribunal Judge, particularly bearing in mind that he was legally represented. He submits that the only issues that could have been raised by the Appellant went to any questions that the judge might have asked him and then the question arises as to why they were not covered by the witness statement.
10. Mr Mohzan points out that the judge did not accept the written statement and that there may well have been extra questions put to the Appellant and that he is entitled to a fair opportunity to put his case fully. He submits that that cannot be the case in this instance, particularly bearing in mind that there are also questions of the Appellant's mental stability which the judge was not given the opportunity to consider.
11. Mr Bates acknowledges the failing to be found in paragraph 26 of the First-tier Tribunal Judge's decision. Therein the judge concludes:

"If he had attended the hearing he could have shed some light on his contradictory responses".

Mr Bates consequently accepts that oral evidence may possibly have made a difference and that consequently there may be an error but leaves it for the court to make a ruling.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. I accept that the Appellant's non-attendance at the hearing before the First-tier Tribunal, or rather his late attendance, was due to no fault of his own but to the failings of the rail network. I acknowledge that he has produced no proof other than a witness statement of this but it is difficult to expect documentary evidence to be provided from the rail company. The Appellant was properly represented in that he had legal representation, it was only his own personal non-attendance that may have caused some prejudice. Indeed, the Secretary of State did not help herself by not having a Home Office Presenting Officer present.
15. However, it is clear from paragraph 26 of the judge's findings that she believed that had the Appellant attended the hearing he could have shed some light on contradictory responses to be found within his witness statement. It is a matter of fairness that he should be given the opportunity to address these issues. In such circumstances procedural unfairness requires that I set aside the decision of the First-tier Tribunal and remit the matter back for rehearing before any other Judge of the First-tier Tribunal than Judge Somal. I would, however, advise the Appellant that a remittal in these circumstances does not necessarily mean that the outcome of any further hearing will not be exactly the same as that that originally was made by the First-tier Tribunal Judge. What is important is that the Appellant has a fair hearing and by finding an error of law, that is the situation that I address.

Notice of Decision and Directions

The decision of the First-tier Tribunal contains a material error of law and is set aside. The following directions are made.

- (1) On finding that there is a material error of law in the decision of the First-tier Tribunal the decision is set aside with none of the findings of fact to stand.
- (2) That the matter be remitted to the First-tier Tribunal sitting at Nottingham or Stoke on the first available date 28 days hence with an ELH of three hours. The Appellant's physical disability is noted and in the circumstances, bearing in mind where he lives, the administration is requested, if possible, to relist this matter at Nottingham centre rather than Stoke.
- (3) That the rehearing of this matter be before any First-tier Tribunal Judge other than Immigration Judge Somal.
- (4) That a Kurdish Sorani interpreter do attend the restored hearing.

No anonymity direction is made.

Signed

Date: 29 September 2017

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT FEE AWARD

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris