



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

Appeal Number: PA128592016

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 5 July 2017

On 1 August 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**S V
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miskiel of Counsel instructed by KILC

For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Aujla promulgated on 20 April 2017 dismissing the Appellant's appeal against a refusal of a protection claim, the protection claim having been refused by the Respondent for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 28 October 2016.
2. The Appellant is a citizen of Sri Lanka, born on 15 November 1985. I do not propose to rehearse his immigration history or the substance of his asylum claim bearing in mind that the nature of the challenge before the Upper Tribunal is essentially one of procedural fairness.

3. The Appellant's appeal was initially listed for hearing on 16 January 2017. On that occasion Ms Miskiel of Counsel attended to represent the Appellant instructed by KILC. The appeal was adjourned and in due course re-listed for 5 April 2017. Ms Miskiel was again instructed to represent the Appellant.
4. On the morning of the hearing Ms Miskiel awoke with what was later diagnosed as a subconjunctival haemorrhage, together with other symptoms that occasioned her very particular concern. I do not propose to go into the details of the medical conditions: suffice to say that there is supporting medical evidence on file and it seems to me that Ms Miskiel had every reason to be concerned about her medical condition and acted appropriately in due course in attending Accident and Emergency. However, as indicated in the Grounds of Appeal, on her way to St. Thomas' Hospital she 'stopped off' at Taylor House where she informed staff of her condition and that she could not attend court. Although there is no record on file of these particular circumstances Ms Miskiel has deposed evidence to that effect, and it is clear that something of this was communicated to First-tier Tribunal Aujla because he responded by indicating that a representative should attend from the solicitor's office. Mr Vallipuram Kulendran accordingly made his way to Taylor House. He has deposed a statement in support of the Grounds of Appeal dated 3 May 2017. In his statement he relates the history in similar terms to that set out above, indicating additionally that he received a call from his client (the Appellant) that the Immigration Judge wanted him to attend the Tribunal and accordingly he rushed to the Taylor House. He says in his statement that he had no documents and was not prepared to present the case. He also says that the Judge in effect entered the room, opened the file and asked him to proceed and "*did not want to listen to my explanation*".
5. The Respondent's representative before the First-tier Tribunal prepared a pro forma attendance note that Mr Armstrong has been able to provide to the Tribunal today. It records under the heading 'Preliminary issues' - "*Counsel taken ill, Judge asked for solicitors to attend instead*".
6. I am satisfied that the circumstances plainly indicated to the Judge that the Appellant's representatives were not ready to proceed on the morning of the hearing and were seeking an adjournment. In the first instance Ms Miskiel informed the staff at the court of her last minute inability to represent the Appellant with no arrangements for alternative representation being made. Rather than granting an adjournment it was the Judge that initiated the attendance of Mr Kulendran. I accept that the Judge did not accede to, or engage with, Mr Kulendran's protestations that he was not prepared to represent the Appellant.

7. It is a troubling feature of this case that the Judge's Record of Proceedings contains no mention of these circumstances that have led to the challenge today. Indeed the Decision of the First-tier Tribunal Judge is also entirely silent on any of these circumstances.
8. The Judge, as is apparent from the foregoing, proceeded with the appeal and in due course dismissed the appeal for reasons set out in his Decision.
9. The Appellant applied for permission to appeal raising grounds in respect of procedural unfairness and also raising some grounds in respect of the substantive decision on the appeal. Permission to appeal was granted on 17 May 2017 by First-tier Tribunal Judge Foudy in material part in these terms:

"3. Although detailed grounds describe the sequence of events on the morning of the hearing, and a witness statement has been submitted by the legal representative, Mr Kulendran, whom the Judge required to conduct the appeal in the absence of Counsel, no reference is made to the application to adjourn the decision. This is highly unusual and it is arguable that it is an error of law as it is a failure to faithfully record all relevant events in the hearing.

4. Mr Kulendran states that he was not prepared to conduct the appeal, having instructed Counsel to do so. It is arguable that this hampered the Appellant's ability to have a fair hearing."

10. Mr Armstrong for the Secretary of State today argues: in substance, irrespective of representation, there was no change in the basis of the Appellant's protection claim; moreover the Appellant still had the benefit of representation at the appeal hearing; yet further there is nothing in the procedural fairness point that would suggest there would have been any material difference in the outcome of the appeal.
11. The applicable law in respect of adjournment and fairness is helpfully explored in the decision of **Nwaigwe (adjournment - fairness) [2014] UKUT 00418 (IAC)**, a decision of the President. My attention has been directed in particular to what is set out at paragraphs 7-9:

"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 focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness.

9. *In passing, I am conscious that the FtT procedural rules are scheduled to be replaced by a new code which is expected to come into operation on 20 October 2014. The provisions relating to adjournments, previously enshrined in rules 19 and 21 have been substantially simplified. Within the new code, the Asylum and Immigration Tribunal (Procedure) Rules 2014, Rule 4(3)(h),*

under the rubric 'Case Management Powers', provides that the FtT -

'may ... adjourn or postpone a hearing'.

This substantially less prescriptive formula reinforces the necessity of giving full effect, in every case, to the common law right and principles discussed above. The overriding objective remains unchanged: see Rule 2. FtT Judges dealing with adjournment issues should continue to apply the principles rehearsed above and the decision of the Court of Appeal in SH (Afghanistan), giving primacy to the criterion of fairness."

12. I note further to the foregoing that the current appeal was indeed decided under the regime of the 2014 Procedure Rules, and in that context I emphasise the President's observation that the "*less prescriptive formula therein reinforces the necessity of giving full effect to the common law right and principles discussed*".
13. In my judgement the First-tier Tribunal Judge singularly fails to demonstrate that he has given consideration and/or full effect to the Appellant's common law right to a fair hearing, in circumstances where his Decision does not address any of the events that have detained the Upper Tribunal in debate today. Judge Foudy's observation in granting permission to appeal is apposite: the absence from the Decision of any record of the circumstances preceding Mr Kulendran's reluctant appearance and the absence of any consideration of an adjournment or an explanation for the decision to proceed, constitute an error of law.
14. I have noted the matters referred to by Mr Armstrong as perhaps indicating that the Judge was perfectly entitled to proceed with the appeal notwithstanding the illness of Counsel who had previously been instructed, and the late attendance of an OISC caseworker who but for the telephone call from his client would have been about his normal daily business and had to, in effect, drop all other matters to attend a hearing for which he was unprepared. I doubt that in all the circumstances the matters identified by Mr Armstrong made it *reasonable* for the Judge to have proceeded. Be that as it may, I have no doubt that it was *unfair* to proceed. The Judge denied the Appellant the benefit of duly instructed and properly prepared Counsel, and moreover offered no explanation in the Decision for so doing.
15. In those circumstances I find the Judge erred in law. The only outcome must be that the decision of First-tier Tribunal Judge Aujla is set aside; the Appellant is entitled to a fair hearing with all issues at large before the First-tier Tribunal anew.

16. Both representatives confirmed that no particular or specific further Directions were necessary: accordingly the appeal is to be re-listed at Taylor House on the first available date before any Judge other than First-tier Tribunal Judge Aujla; standard directions are to be issued.
17. For the avoidance of any doubt I make the following observation. I was initially surprised to see Ms Miskiel appearing before me in circumstances where aspects of the Appellant's challenge were based on her account of events on the morning of the First-tier Tribunal hearing, and there was no prior indication as to the extent to which such matters were accepted. (The Respondent's Rule 24 response essentially complained that details of the challenge had not yet been seen by the Respondent.) However, Mr Armstrong did not seek to challenge Ms Miskiel's account of her conduct on the morning of the hearing, or any of the supporting medical evidence. In the circumstances I was satisfied that it was appropriate to proceed with Ms Miskiel acting as the Appellant's representative today.

Notice of Decision

18. The Decision of the First-tier Tribunal contained a material error of law and is set aside.
19. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Aujla with all issue at large.

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.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed:

Date: **6 July 2017**

Deputy Upper Tribunal Judge I A Lewis