



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA138262016

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
on 5 May 2017**

**Decision promulgated
on 17 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**P W
(Anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani instructed by Duncan Lewis & Co, Solicitors.
For the Respondent: Mr Staunton - Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge NMK Lawrence ('the Judge'), promulgated on 10 February 2017, in which the Judge dismissed the appellant's appeal against the refusal of a grant of international protection and/or leave to remain on human rights grounds.

Error of law

2. The appellant, a national of Botswana, who claimed to have been born on [] 1980, entered the United Kingdom on 13 September 2011

- lawfully with leave as a Tier 4 (General) Student Migrant to undertake a three-year course at Glamorgan University.
3. The Judge considered an adjournment application which is referred to in the decision under challenge from [7] to [17]. The Judge noted an application for an adjournment made on the 21 December 2016 having been refused at the prehearing review stage on 30 January 2017, nine days before the substantive hearing, and a second written adjournment being submitted on 10 January 2017 also being re-refused. The basis of the adjournments was to enable the applicant to (i) obtain an updated report by a named Consultant Clinical Psychologist, (ii) to compile country information and (iii) to instruct a Dr Galvin of the University of Botswana to prepare a Country Expert report.
 4. The appellant's representative before First-tier Tribunal Judge NMK Lawrence, Mr Neale, renewed the application orally to grounds being (i) to obtain a psychological assessment and (ii) to obtain a country expert report. It was accepted there was report from the Helen Bamber Foundation relating to the appellant's psychological presentation and the reason for obtaining the additional report was said to relate to uncertainty regarding the respondent's position and it appearing highly likely that the respondent intended to test the appellant's evidence. In relation to the country expert report Mr Neale submitted the report was required on the risk of rape and threats from drug dealers in Botswana.
 5. The Judge's reasoning for refusing the adjournment request, and comments upon the proceedings generally, are set out at [12] - [17] of the decision under challenge in the following terms:
 - "12. In considering the application, I took into account the aforementioned letters from Duncan Lewis, "Adj Doc" and oral submissions by both representatives. I note that, in so far as the country report is concerned, the appellant first mentioned fears of drug gangs in her asylum interview (see:q71). I also note that at every outset of the interview, the appellant was asked if she has any documents she wished to rely. The appellant said she wishes to submit 'objective information which deals 'FGM and the corruption in Botswana and about criminals who get away with what they have done' (see:q2 of AIR). These are the matters for which a report is now sought. The interview took place on 21 August 2014. Duncan Lewis represented the appellant at that time. They have had copies of the transcript of the interview. It seems to me, the appellant and more particularly Duncan Lewis, were on notice, since 21 August 2014, that drug gangs and corruption are an issue for the appellant.
 13. I note that Duncan Lewis practice in the asylum field on a regular basis, in the London area and in the Midlands. It is not credible that it did not occur to them, soon after the asylum interview, to instruct a country expert, if a country expert report were deemed, according to them, necessary. They have had two years to address the issue. The Judicial Review only came to the fore in and around August/September 2016. There is no explanation for not being active, either by the appellant or by Duncan Lewis, on this issue since 21 August 2014. Accordingly, I refuse the application to adjourn.
 14. In respect of the further psychological report there is already a report. Insofar as any concern Duncan Lewis might have, about the respondent challenging the appellant's credibility at the hearing, again, I find Duncan Lewis have had

plenty of time to obtain another report to bolster the report from Helen Bamber Foundation. Accordingly, I refuse to grant the application for an adjournment.

15. Duncan Lewis did not submit any bundles on behalf of the appellant for the hearing. I noticed Mr Neale had a bundle. He informed me he had been provided with a bundle on behalf of the appellant. I asked him if the bundle contains all the material he wishes to rely on. He confirmed it does. I asked him if I could make two copies. I made a copy for myself and one for Mr Henry. The hearing was adjourned to be heard at 2 PM so that Mr Henry and I could have time to consider the bundle (a week later I received a bundle from Duncan Lewis; there was no need to have incurred this expenditure; Mr Neale would have informed Duncan Lewis that I had already copies of the bundle).
 16. The appellant gave oral evidence. She adopted the written evidence and her latest witness statements. She was cross-examined but not re-examined. I have recorded the appellant's oral evidence in my Notes of Evidence. At the conclusion of the oral evidence I heard oral submissions from both advocates. This is also recorded in my Notes of Evidence.
 17. In determining this appeal I have taken into account the evidence contained in the respondent's bundle (hereinafter "Resp 1"), the evidence contained in the appellant's bundle (hereinafter "App 1"), the documents submitted on behalf of the appellant at the hearing, the oral evidence and the submissions made on behalf of both parties."
6. The way the Judge considered the adjournment request is challenged in Grounds 1 and 2 of the appellants Grounds of Appeal, which assert:

"Ground (1) fairness - failure to direct or apply legal test

6. The A made three written applications to adjourn in advance of the hearing, the last on 10 January 2017. At the hearing, the FtT was "invited to adjourn the appeal to allow A's solicitors to obtain (a) a country expert report and (b) a psychological report".
7. The need for at least a country expert report was clear in this case; to provide context in which to assess A's claim, and in order to assess risk at the date of the hearing. As A noted in her third adjournment application: "There is no publicly available and up-to-date Home Office Country Information and Guidance on Botswana. The material cited in the RFRL is not publicly available but is the result of the Home Offices own request for information. The material cited dates to 2011. In our own research, we have found reports that date to 2012."
8. For the reasons given by the FtT (paras 7 to 14) it refused to grant an adjournment. The FtT refused the adjournment primarily because the FtT considered A had enjoyed sufficient time to prepare for her appeal. The FtT rejected the application without considering, at any time, whether proceeding with the appeal would be fair. The FtT did not refer to the applicable procedure rule or any authority or the word "fair" anywhere in its determination: *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418.

Ground (2): Failure to have regard to relevancies

9. Further to Ground (1), in refusing to adjourn the FtT failed to take into account a number of relevant considerations. The FtT failed to take into account: (a) that the Respondent's decision to refuse and certify the claim took two years

to make (2014 - 16); (b) that A could not reasonably be expected to expend public money on the production of bespoke expert opinion prior to the SSHD's decision because (i) the Legal Aid Agency ("LAA") would not grant funding to get one, and/or (ii) the decision may have been positive; (c) once the decision was made, the A was not entitled to rely on post decision evidence (being judicial review proceedings) save in exceptions that do not apply; (d) to the LAA would not provide funding for expert opinions in advance of an appeal that depended upon the final determination of the judicial review claim as here; (e) the final determination of the judicial review claim remained unknown until the day before the trial on 30 November 2016 2016 (the Respondent defended the claim until the day before the substantive hearing listed at the Upper Tribunal when she accepted the claim was not manifestly unfounded); (f) the appeal was listed on the same day that notice of appeal was lodged (14.12.2016); (g) in between lodgement and the hearing date, A's legal representatives office was closed due to Christmas and New Year, and; (h) A had 11 working days to prepare the appeal and took all necessary steps available to her to secure the opinion evidence required.

10. Further to grounds one and two, the FtT's refusal to grant an adjournment without regard, or enquiry into these considerations renders its refusal to give A more time to secure an expert report unfair."

7. Permission to appeal was initially refused on this ground by another judge of the First-tier Tribunal for the following reasons:

"It is not arguable that the Tribunal deprived the appellant of her right to a fair hearing given the length of time that she had been given to prepare for it and the existing evidence that was available to support her appeal. The failure of the Tribunal to make express reference to the concept of 'fairness' was not therefore arguably material to the objective question of whether she in fact received a fair hearing. Given that it is clear from paragraphs 11 and 12 of its decision that the Tribunal took account of all such matters as Counsel had brought to its attention concerning the reasons for delay in preparing for the appeal, it is not arguable that the Tribunal failed to have regard to material matters in refusing the application to adjourn the hearing. Neither is it arguable that there was any substantive unfairness in failing to put to the appellant to the matters listed in the third ground absent any explanation that she may have had for them. Whilst the absence of reference to an event in an MLR does not necessarily mean that the appellant did not mention it to the author of the report, it does not follow from this that it was an arguable error of law for the Tribunal to rely upon the absent reference given that (a) the burden was upon the appellant to substantiate the truth of her claim by credible evidence, and (b) she had chosen to rely upon the MLR to support that claim. Finally, it is not arguable that the tribunal made an error of law in relying upon Court of Appeal authority for its interpretation of the phrase "very significant obstacles" given that this test is equally applicable under paragraph 276 ADE of the Immigration Rules (which the Tribunal applied to the appellant) and section 117D of the 2002 Act (which, contrary to the assertion in the grounds, the Tribunal did not apply to her case). Neither is it arguable that the Tribunal was required to consider factors under section 117B of the Act given its unchallenged finding that there was no evidence of 'compelling circumstances' such as to warrant consideration outside the Immigration Rules [paragraph 41]. Permission to appeal on grounds 1, 2, 3, and 6 is accordingly refused."

8. Permission to appeal was granted on grounds 3 and 4.

9. The appellant renewed the application for permission to the Upper Tribunal, following which permission was granted by Upper Tribunal Judge Canavan in the following terms:

- “2. First-tier Tribunal Judge Kelly granted permission to appeal in relation to the issues raised in the appellant’s fourth and fifth grounds of appeal but refused permission in relation to the first two grounds (relating to fairness issues regarding an adjournment request) and the third ground (relating to fairness issues regarding failure to put credibility matters to the appellant at the hearing).
 3. Although the first two grounds do not particularise in any detail how or why an expert country report was likely to have made any material difference to the outcome of the appeal, save to say that there is little background evidence available relating to Botswana, it is at least arguable that the judge only concentrated on the time that the appellant’s representative had to obtain the report without considering whether it might be relevant to a fair and proper determination of the appeal.
 4. It is also arguable that the judge may have erred in failing to put concerns regarding apparent inconsistencies in the appellant’s account to the appellant during the hearing in circumstances where those issues were not raised in the decision letter.”
10. Permission was therefore granted on all grounds.
 11. It is not a legal requirement for a judge to set out in detail every decided authority of the Senior Courts or relevant piece of legislation, such that a failure to do so will amount to an arguable error of law. It is acceptable to assume that the Judge, who has considerable experience within the First-tier Tribunal, is aware of the correct legal test that should have been in his mind when considering the merits of the adjournment application.
 12. It is also settled that the relevant issue is not the conduct of the Judge per se. 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
 13. In *R (on the application of AM (Cameroon) v AIT 2007 EWCA Civ 131* the Court of Appeal said that unfair decisions on interlocutory matters, such as adjournments or the admission of evidence, can amount to errors of law. Such decisions will have to be grounds for arguing that they display gross procedural unfairness or a complete denial of natural justice. In that case that Court of Appeal thought that was the case because the judge refused to adjourn when the appellant was medically unfit to give evidence; because he listed the case for a day when counsel was not available; and because he refused permission for evidence to be taken on the phone.

14. The alleged procedural unfairness in the Judge refusing the adjournment request arose due to the procedural history of this matter. The Judge found that the appellant had had sufficient time to prepare for her appeal but appears to give no consideration to the procedural history and how this impacted upon the ability of a publicly funded individual to act in the manner the Judge deemed appropriate.
15. This is set out in detail in the renewed grounds of appeal, Ground (2), set out above.
16. There is no obvious consideration by the Judge in the decision of the reality of this matter and difficulties facing the appellant in relation to the procedural history which provided only a limited window of opportunity to enable the appellant to prepare for the appeal. As a protection appeal it is important that adequate time was provided.
17. In *Al-Jedda v SSHD [2010] EWCA Civ 212* SIAC refused an application for an adjournment to obtain an expert's report on the complex issue of statelessness from an Appellant whose British citizenship had been revoked. The Court of Appeal said this was wrong in law and productive of procedural unfairness. The procedural history indicated that the claimant had had difficulties getting an expert's report on this complex issue. The difficulty was not attributable to him personally and the culpability of his representatives was minimal.
18. Paragraph 8 of the Presidential Guidance Note number 1 of 2014 states that factors weighing in favour of an adjourning an appeal include (c) where further time is needed because of the delay in obtaining evidence which is outside the parties control, for example, where an expert witness fails to provide a report within the period expected.
19. This is not a case of an individual's representative failing to act with due diligence, as Duncan Lewis focus their attention upon the decision the appellant could challenge prior to the Secretary of States conceding the judicial review claim. It was only as a result of the concession late in the day that the appellant was able to exercise a right of statutory appeal against the refusal of her protection claim. The 'clock' effectively began to run from the lodging of the appeal, as the issues before the Upper Tribunal in a judicial review matter are different from those considered by the First-tier Tribunal in a statutory appeal. The former involves consideration of Public Law principles as opposed to the fact-finding jurisdiction in a statutory appeal.
20. There are also several other matters of concern in relation to the decision under challenge, which give cause for concern, and which were the subject of the grant of permission by First-tier Judge Kelly in relation to the fourth and fifth grounds of challenge.
21. Ground (4) asserts the Judge failed to have regard to the fact the respondent had accepted that the appellant was raped on multiple occasions, and that when assessing the testimony of rape victims: *"the shame and trauma that a person has experienced as a result of gender-based violence may however result in their evidence being less than complete, coherent or consistent. It may also mean that they delay disclosure."* This latter statement appearing in the

respondents own publication 'Assessing credibility and refugee status, Version 9.0, Publication date: 6 January 2015, at para 7.8'.

22. Ground (5) asserts a misdirection in law and three material aspects when assessing the medical evidence being (i) by determining the credibility of the medical evidence as an "add-on" rather than part of the global assessment as evidenced by concluding in [30] that the appellant had made up a "non-existent" asylum claim described in that paragraph, at [31] describing the claim as "fiction", but only thereafter considering the weight to be given to the medical evidence. This probably leads to the further alleged error in the Judge attaching "no weight" to the medical evidence for the reasons set out above. The Judge was required to give adequate reasons if it was considered little weight should be attached to the report of the Helen Bamber Foundation, especially in light of the fact the author of the report said that the "overall evaluation" of the appellant's injuries are "consistent with", "highly consistent" and/or "typical of" the mistreatment suffered. The Judge in [31] hypothesised regarding possible causation which was preferred in place of the clinical judgment of the Helen Bamber Foundation, which is not a position that is adequately reasoned.
23. The general approach by the Judge to this matter is infected by material legal error sufficient to warrant the findings of the Judge unsafe.
24. The only option in relation to this matter is to set aside the decision in its entirety and remit the appeal to First-tier Tribunal sitting at Hatton Cross, to be heard by another judge of that tribunal appointed by the Resident Judge per the operational requirements of the Hearing Centre.

Decision

25. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to Hatton Cross.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 1⁵th of May 2017