



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

Appeal Number: PA/12551/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 27th February 2018**

**Decision & Reasons
Promulgated
On 1st March 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**S N
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born in 1989. He arrived in the UK in December 2011 as a Tier 4 general student migrant. His leave was curtailed to expire on 30th April 2012. He made subsequent unsuccessful applications to remain as a Tier 4 student migrant, and an

appeal was dismissed in December 2014, with his becoming appeal rights exhausted in May 2015. In July 2017 he was encountered by the Immigration Service and detained. He made an asylum claim but then withdrew it, and then remade another claim on 6th September 2017. He was interviewed on 17th October 2017 about his asylum claim, and the claim was refused on 22nd November 2017. His appeal against the decision refusing asylum was dismissed by First-tier Tribunal Judge NMK Lawrence in a determination promulgated on the 2nd January 2018.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Bird on 11th January 2018 on the basis that it was arguable that the First-tier judge had erred in law in refusing to adjourn the appeal as the applicant had a cyst on his left eye and was awaiting a psychological report from Medical Justice, and produced evidence of both of these things. It was arguable that it was unfair not to adjourn the hearing until the appellant was fit and had evidence to support his asylum claim.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law. There was an attempt by the appellant, who now acts in person, to adjourn this hearing due to health issues but that application was refused by Upper Tribunal Judge O'Connor on 16th February 2018 on the basis that the issue before the Upper Tribunal was primarily one of procedural fairness relating to the Medical Justice report, and as this report was now available the Upper Tribunal would be able to assess whether unfairness had resulted and in these circumstances an adjournment would not be in the appellant's best interests.

Submissions – Error of Law

4. The grounds of appeal contend that the appellant did not have a fair hearing before the First-tier Tribunal as his mental health was a major factor in his case and that Tribunal had failed to adjourn the hearing to await the Medical Justice report which had been commissioned, and in addition it was not fair not to adjourn due to his eye cyst. The appellant, who made his submissions to me through a court interpreter, put forward further evidence from his GP which concludes that he was not fit to go through a hearing before the Upper Tribunal due to the lack of sleep and pain he is experiencing from the swelling above his left eye brow and the distressing effect on his vision. I explained that I felt that it was in his best interests to deal with the legal issue of whether there had been a breach of procedural fairness today, and assured him he would not have to provide any evidence. I appreciated he was a vulnerable witness due to his psychological and physical ill-health.
5. There was no Rule 24 notice. However, Mr Lindsay made submissions that although there was an error in the test applied by the First-tier Tribunal with respect to whether the adjourn the decision not to adjourn was lawful as at that point the appellant had a legal representative who should have explained to the First-tier Tribunal why it had not been

possible to obtain a medical report in time for the hearing, or simply obtained that report in time. Mr Lindsay also argued that it was wrong for the appellant to have produced the report with this application for permission to appeal as this was not evidence before the First-tier Tribunal.

6. I informed the parties that I found that the First-tier Tribunal had erred in law and that this error was material for the reasons set out below. It was also relevant to review the report to consider the appropriate way forward with the appeal having established that there was a material error in law.

Conclusions – Error of Law

7. The basis on which the application for an adjournment was refused was undoubtedly unlawful. At paragraph 5 of the decision the adjournment is prepared because the First-tier Tribunal Judge found he “could not grant the adjournment” because hearings cannot be adjourned without a firm appointment date for the assessment, in this case by Medical Justice. This position is said to be justified by the overriding objectives.
8. In fact the Presidential Guidance for the First-tier Tribunal on Adjournments reads as follows:

Adjournments

6. Rule 4(3) gives the power to adjourn or postpone a hearing. This power must be exercised in accordance with the overriding objective and having regard to any other relevant considerations. The decision of the Upper Tribunal in *Nwaigwe (adjournment; fairness)*[2014] UKUT 00418 (IAC) emphasises the importance of the test of fairness and the question of whether a party will be deprived of a fair hearing if an adjournment is refused.

7. Each application to adjourn must be considered on its own merits, examining all the factors brought to the Tribunal’s attention. When reaching a decision on such an application, the Tribunal may also have regard to information already held and its own special expertise (see rule 2(2)(d)).

8. Factors weighing in favour of adjourning an appeal, even at a late stage in proceedings, include.

(a) Sudden illness or other compelling reason preventing a party or a witness attending a hearing. Normally such a reason should be supported by medical or other relevant evidence, unless there has been insufficient time to obtain such evidence. However, where there is no likelihood that the party will be able to attend a hearing within a reasonable period, a hearing may proceed in absence where the tribunal considers that this is in the interests of justice in terms of rule 28.

(b) Late changes to the grounds of appeal or the reasons for refusal which change the nature of the case. The terms of rules 19(7), 23(2)(b) and 24(2) should be taken into account, as appropriate, when considering changes to the grounds or reasons.

(c) Where further time is needed because of a delay in obtaining evidence which is outside the party's control, for example, where an expert witness fails to provide a report within the period expected.

9. The following factors, where relevant, may weigh against the granting of an adjournment.

(a) The application to adjourn is not made at the earliest opportunity.

(b) The application is speculative, such as, for example, a request for time for lodging further evidence where there is no reasonable basis to presume that such evidence exists or could be produced within a reasonable period.

(c) The application does not show that anything material would be achieved by the delay, for example, where an appellant wants more time to instruct a legal representative but there is no evidence that funds or legal aid is available.

(d) The application does not explain how the reason for seeking an adjournment is material to the case, for example, where there is a desire to seek further evidence but this evidence does not appear to be material to the issues to be decided.

(e) The application seeks more time to prepare the appeal when adequate time has already been given. In such circumstances, the Tribunal may take into consideration a failure to comply with directions. However, a failure to comply with directions will not be sufficient of itself to refuse an adjournment.

9. It follows that needing more time to obtain an expert report is a proper basis to grant an adjournment even at a late stage, and the question to be asked was would it deprive the appellant of a fair hearing to refuse the adjournment. The First-tier Tribunal should have asked itself on the one hand whether the evidence could be material and on the other whether its production was speculative. Clearly it was not speculative as Medical Justice had agreed to provide an independent medico-legal report, as set you in their letter of 11th December 2017, and had agreed to do this as soon as possible. That letter confirmed that there was a Rule 35 report on the appellant which had also set out mental health problems.

10. The report had clear potential relevance to the determination of the appeal as the appellant argues that he is a real risk of persecution if returned to Pakistan as he is a gay man, and evidence of mental health problems could explain delay in claiming asylum and a physical examination of scars could have provided corroborative evidence of his history of abuse. The appellant also argues that he would have very significant obstacles to integration and is entitled to remain on Article 8 ECHR private life grounds by reference to paragraph 276ADE of the Immigration Rules, and again mental health problems would have potential relevance to any such argument.

11. The refusal of the adjournment was therefore an error of law as it was materially procedurally unfair.
12. The report of Dr V Lilford of Medical Justice is now available. This report concludes, in short summary, that the claimant has asthma and a cyst above his left eye which requires urgent assessment and for which he has been referred for further investigation. It is important that this happens as it could be causing him pain and distress, and possible dizziness. In terms of his mental state the applicant suffers from moderate depression and anxiety, and had suicidal thoughts but had no intention to self-harm. The lack of scars from the ill-treatment the appellant says he was subjected to by his family is found to be consistent with the ill-treatment described. It is considered whether the appellant is feigning his psychological symptoms but Dr Lilford is satisfied, with reasons, that this is not the case. I find that this report will be material to the assessment of the credibility of the appellant's asylum claim.
13. In light of the finding of legal error in the form of procedural unfairness which was material to the appeal and of the further psychological evidence requiring considerations in the round I set aside the decision of the First-tier Tribunal with no findings preserved and remit the matter to the First-tier Tribunal for remaking.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal.
3. I remit the remaking of the appeal to the First-tier Tribunal with no findings preserved.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley

Date: 27th February 2018

Upper Tribunal Judge Lindsey