



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16134/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 30 August 2019

Decision & Reasons Promulgated  
On 13 September 2019

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

Y J  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss R Bagral, Counsel, instructed by direct access  
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Lodge ('the Judge') issued on 13 May 2019 by which the appellant's appeal against a decision of the respondent to refuse to grant him leave to remain on human rights (Article 8) grounds was refused.
2. Judge of the First-tier Tribunal Grant-Hutchison granted permission to appeal on all grounds.

## **Anonymity**

3. The Judge did not issue an anonymity order. I am mindful of Guidance Note 2013 No 1 concerned with anonymity orders and I observe that the starting point for consideration of anonymity orders in this chamber of the Upper Tribunal, as in all courts and Tribunals, is open justice. However, I observe that as part of the appellant's claimed history he refers to having been regularly physically and sexually abused as a child and asserts that he possesses suicide ideation. I find that the publication of the appellant's name creates a risk of harm to his mental health of such nature as to require derogation from the basic principle of open justice so as to secure the proper administration of justice on the facts arising in this appeal.
4. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or any member of his family. This direction applies to, amongst others, the appellant and the respondent. 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 publication of the contents of his human rights claim.

## **Background**

5. The appellant is a national of India who is aged 27. He secured entry clearance as a Tier 4 (General) Student and entered this country in September 2009 when aged 17. His leave was subsequently varied on several occasions, finally expiring on 30 April 2017. During this time, he secured a BA in Business and Management and pursued Association of Chartered Certified Accountant (ACCA) qualifications. He resided in accordance with his conditions of leave.
6. On 28 May 2017, within 28 days of the expiry of his previous leave, he applied for indefinite leave to remain on ten-year long residence grounds. The respondent refused the application by way of a decision dated 16 November 2017, concluding that the appellant had not satisfied the residence requirements of paragraph 276B(a)(i) of the Immigration Rules.
7. As to private life rights under paragraph 276ADE the decision detailed, *inter alia*::-

*"You have stated that the thought of returning to India only brings back memories of a disturbing childhood in which you remember fights and violence between your parents. You have stated that you started to have suicidal thoughts in your early teenage years".*

*"It is the view of this department that you are an adult, who spent his formative years from birth to the age 17 in India. If you return it will be to a country where you speak the language. In addition, you would be able to live anywhere in India and would not have to live near your parents".*

### Hearing before the FTT

8. The appeal came before the Judge at Birmingham on 1 May 2019. The appellant was represented, as he is before the Upper Tribunal, by Miss Bagral, Counsel, who sought an adjournment on his behalf. She confirmed that in her opinion the appellant was not in a fit state to give evidence and she sought an adjournment for six weeks. In refusing the application the Judge observed, inter alia, that no medical report had been filed with the Tribunal and there was no evidence confirming that the appellant was medically unfit to give evidence and unable to take part in proceedings.
9. Upon the hearing proceeding, Miss Bagral appropriately observed that the appellant could not succeed on family life grounds under the Immigration Rules and relied upon the private life provisions of paragraph 276ADE(1)(vi) of the Rules, asserting that very significant obstacles existed in relation to his integration in India. The Judge proceeded to determine that the appellant could not succeed under this Rule, nor would his removal from this country be unjustifiably harsh as the appellant always knew that whilst holding student status he would be required to return to India.

### Grounds of Appeal

10. Miss Bagral drafted detailed grounds and I observe that they were authored with significant care. The introduction observes, inter alia:-

*“The appellant is a vulnerable person. The evidence from the appellant’s doctor confirmed an anxiety disorder and low mood. In March 2018 the appellant commenced Cognitive Behavioural Therapy (CBT) and participated in twelve sessions until October 2018. A letter from his therapist confirmed that his anxiety was found to have developed following traumatic incidences of abuse and neglect in childhood. It was noted that the appellant’s memories of his early experiences caused him distress and it was decided that CBT was not the right treatment and that the appellant would benefit from a longer term and more explanatory form of counselling outside of the NHS. The appellant commenced a course of private counselling with Re-Vision in the first week of March 2019. A letter from a trainee counsellor at Re-Vision confirmed the appellant’s attendance for counselling and further confirmed that counselling was expected to continue until 14 November 2019.”*

11. By way of ground 1 it is observed:-

*“7. The appeal was listed for hearing on 10 August 2018 and adjourned on application by the appellant as his CBT therapist opined that at that time a court appearance would cause significant anxiety. The appeal was listed for hearing on 22 February 2019. On 8 January 2019 the appellant’s then representatives lodged a written request for an adjournment in order to allow the appellant to commence and complete 6 weeks of counselling (recommended by his CBT therapist) that was scheduled to commence in the first week of March. The adjournment request was granted, and the appeal was relisted for 1 March 2019 (a week later). The appellant believes that this was an administrative error by the Tribunal as the requested adjournment period was at least 6 weeks. The appeal came before Judge Cox on 1 March who considered this background and acceded to the appellant’s further*

*request for an adjournment to enable him to commence and complete a course of counselling (30 sessions at a rate of 5 sessions per week) and to produce a medical report or a report from his counsellor by 22 April 2019. The appeal was accordingly adjourned to 1 May 2019.*

8. *The appellant then received a Notice from the Tribunal directing him to file further evidence by 2 April. He wrote to the Tribunal on 12 March 2019 requesting that the time to file evidence be extended to 22 April 2019 as agreed by the parties before Judge Cox on 1 March 2019.*
9. *On the date of the hearing, of 1 May 2019, the appellant had completed approximately 6 weeks of counselling. These sessions had the effect of heightening the level of the appellant's anxiety and he was advised to reduce the sessions to once a week. Accordingly, counselling was extended to continue to mid-November 2019. The appellant reported his increased level of anxiety to his Doctor and was prescribed anti-depressants [ABS/2].*
10. *At the hearing the appellant presented with a heightened state of fear and anxiety and in consequence instructed counsel that he did not feel well, was frightened and unable to enter the hearing room and give evidence. The appellant hoped that his heightened state of anxiety would lower as counselling progressed thereby reducing his vulnerability and allowing him to feel able to engage with proceedings at some future date after 6 weeks and thus instructed counsel to apply for an adjournment on that basis."*
12. Miss Bagral then carefully detailed a number of asserted errors of law by the Judge as to the adjournment request. Such errors are contained within two pages of the grounds. I observe that each complaint is drafted in an assiduously fair manner and the general theme was that the Judge unfortunately misunderstood previous judicial decisions upon reading the notes on file. This is particularly so as to the purported failure by the appellant to file medical evidence. I note that there is no unwarranted criticism of the Judge in the grounds.
13. Four other grounds of appeal are relied upon. At their heart there is a complaint that in considering an appeal of a vulnerable person the Judge failed to apply the guidance of the Court of Appeal in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123; [2018] 4 WLR 78.
14. Ground 2 asserts:-
 

*"Once the refusal of the adjournment request was communicated to the appellant by counsel, the hearing proceeded, and the appellant was not called to give evidence due to his heightened state of anxiety. The Judge therefore only had the appellant's written testimony to consider, but in his consideration of the same, which included a finding of adverse credibility, the Judge failed to make appropriate provision for the fact that he was assessing the evidence of a vulnerable witness as confirmed by his diagnosis which was not challenged by the respondent."*
15. In granting permission to appeal, by way of a decision dated 19 June 2019, JFtT Grant-Hutchison reasoned:-

*“It is arguable that the Judge was not aware or misconstrued the full background relating to the appellant’s mental health and that previously Judge Cox had adjourned the case previously not only to obtain a medical report but to allow the appellant to obtain treatment and commence counselling. This could have made a material difference to the outcome of the case when considering the facts found and the findings made in relation to the appellant’s circumstances and family life or to the fairness of the proceedings. Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) which is referred to in the granted permission to appeal and is referred to for its terms. In addition, although the Judge proceeded to hear the case on the basis of the appellant’s written testimony because he was not called to give evidence because of his heightened state of anxiety it is further arguable that the Judge made no reference to the guidance to apply in such circumstances asked (sic) detailed and the case of AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 which is also referred to in the grounds for permission to appeal and is referred to for its terms.”*

16. No Rule 24 response was filed by the respondent.

### **The Hearing**

17. The representatives informed me at the outset of the hearing that they were in agreement that the Judge’s decision was flawed by legal error, such that it should be set aside. It was agreed that the failure to consider the Joint Presidential Guidance Note No 2 of 2010 concerned with vulnerable witnesses and the guidance provided by the Court of Appeal in AM (Afghanistan) was a material error of law.

### **Decision on Error of Law**

18. I have sympathy for the Judge who understood that the appellant had attended the hearing centre to pursue his appeal and only became aware as to the true state of events upon arriving in the hearing room, being faced with the appellant’s refusal to enter the hearing room and Miss Bagral’s subsequent application for a short six-week adjournment. However, having decided to proceed with the appeal the Judge was required to act fairly. The Judge was aware of the appellant’s medical condition:-

*33. There are a number of medical letters within the appellant’s bundle, a letter dated the 8 April 2019 from the appellant’s GP states that the appellant suffers from anxiety and low mood and takes anti-depressants. There are a number of letters with regard to the therapy and counselling the appellant has undergone. A letter of the 1 February 2019 refers to his traumatic childhood. It is said that the therapy sessions are progressing ‘it has become apparent that his anxiety is explained with reference to specific groups of people’. It is said the appellant struggles to complete day to day tasks and that impacts upon his ability to gather documents for his pending court case. A letter of the 3 July 2018 speaks of his growing up in India witnessing fighting and arguments between his parents. ‘He also discloses historic childhood sexual abuse and experiences of great distress when discussing this’.*

*34. In evidence before me the appellant’s aunt said she became aware of his mental health problem in 2015 and that was when he first went to the GP with regard to that problem. The appellant, however, says that it was after his visa application was refused in 2017 that he started having flashbacks of traumatic childhood incidents.*

*Looking at the medical evidence, all the medical evidence I have before me is post the refusal letter. I have not been provided with any GP records for the years 2015 onwards.*

19. I find that when undertaking what proved to be an adverse assessment of the appellant's credibility the Judge undertook no preliminary consideration as to whether the appellant is a vulnerable person, and if so, how such vulnerability may impact upon the presentation of his evidence. The Court of Appeal gave guidance in *AM (Afghanistan)* on the general approach to be adopted in law and practice by the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal where claims for asylum were made by vulnerable persons whose ability to participate effectively in proceedings might be limited. The guidance is designed to ensure that such persons enjoy an effective right of access to the Tribunal and a voice in the proceedings and that their claims are fairly determined. I observe that the court's scripture, that in appeals concerning vulnerable appellants, the higher standards of procedural fairness are required. Though the Court of Appeal was concerned with an asylum appeal, the requirement that an appellant enjoy effective access to justice, and in particular that his voice be heard in proceedings, is applicable to all hearings before the First-tier Tribunal as well as this Tribunal. In this instance the failure to undertake an assessment as to whether the appellant is a vulnerable person in light of the medical evidence relied upon, led to a failure to abide by the overriding objective established by Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and so there is a fundamental procedural unfairness sufficient for this Tribunal to intervene.
20. I further observe that when considering unfairness, I am not required to consider whether ultimately the decision reached is one which was open to the Tribunal or was *Wednesbury* unreasonable or perverse. The sole test is whether it was unfair. I remind myself that Tribunals, like courts, have to set aside a determination reached by the adoption of an unfair procedure unless satisfied that it would be pointless to do so because the result would be the same: *John v. Rees* [1970] CH. 345 and *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284.
21. Whilst it would be open for a Judge of the First-tier Tribunal to decide that there was insufficient evidence to establish vulnerability, upon considering the evidence presented in this appeal I cannot find that no Judge could reasonably find him vulnerable and so proceed to assess his suicide ideation as being of such nature as to allow his appeal on article 8 grounds. The appellant may have to cross several high hurdles, but I cannot say that he enjoys no chance of success on his suicide ideation grounds. In such circumstances the procedural unfairness is such that the decision of the Judge must be set aside. Having found in the appellant's favour as to there having been a material error of law in respect of ground 2, I am not required to consider grounds 1 and 3 to 5.

### **Remittal**

22. As to remaking the decision I am again mindful that the appellant may be considered to have several hurdles to cross in order to succeed in his appeal. I do not discount his ability to do so as I have not considered the core issues of his appeal in significant

detail. However, whilst noting the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and its confirmation that the Upper Tribunal is likely to proceed to remake the decision following the finding of a material error of law, I am mindful that Judge Cox previously adjourned the appellant's hearing in March 2019 so as to permit the appellant to undertake counselling and to then produce a medical report from his counsellor. In such circumstances, and being aware that the issue of vulnerability remains to be fairly decided, I observe paragraph 7.2 of the Joint Practice Statement:-

“7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision instead of remitting the case to the First-tier Tribunal unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has to be to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2 it is appropriate to remit the case to the First-tier Tribunal”.

23. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no adequate consideration of his appeal to date and has not yet enjoyed a fair hearing. It is appropriate that the issue as to vulnerability is first considered by the First-tier Tribunal.

### **Notice of Decision**

24. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 13 May 2019 pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
25. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judge of the First-tier Tribunal Lodge.
26. No findings of fact are preserved.

### **Directions**

27. The appellant resides in London and has requested that his appeal be transferred to the First-tier Tribunal sitting at Hatton Cross.
28. This is not a matter that should be subjected to unwarranted delay. The appellant is required to produce medical and other evidence upon which he wishes to rely. His

counselling with Re-Vision is scheduled to conclude on 14 November 2019 and Judge Cox expected a medical report to be produced from his counsellor. Being mindful as to the burdens placed upon report writers, I direct that the appellant should be granted eight weeks from 14 November 2019 to file and serve any medical evidence to be relied upon, taking into account the Christmas and New Year holidays, and the hearing of this appeal is to be listed on the first available date two weeks thereafter.

29. I direct the following:

- (1) At the appellant's request the hearing of this appeal is to be transferred to the First-tier Tribunal (IAC) sitting at York House.
- (2) The appellant is to file with the First-tier Tribunal (IAC) at York House and serve upon the respondent any further evidence he wishes to rely upon, including medical evidence no later than by 4.00 p.m. on 9 January 2020.
- (3) This appeal is to be listed on the first available date on or after 23 January 2020 with a time estimate of two hours. It is not to be placed on the float list.

Signed: D O'Callaghan

**Upper Tribunal Judge O'Callaghan**

Date: 5 September 2019