



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: PA/11417/2018

THE IMMIGRATION ACTS

Heard at: Field House  
On: 30 January 2019

Decision and Reasons Promulgated  
On: 6 February 2019

Before

Deputy Upper Tribunal Judge Mailer

Between

[ I I ]

NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Jafar, counsel, instructed by UK Lawyers and Advocates

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

DECISION AND REASONS

1. The appellant is a national of Egypt, born on 10 July 1993. He appeals with permission against the decision of First-tier Tribunal Judge Stedman, promulgated on 14 November 2018, dismissing his appeal against the respondent's decision dated 11 September 2018 to refuse his asylum, humanitarian protection and human rights claims.
2. In granting the appellant permission to appeal, First-tier Tribunal Judge Doyle stated that it is arguable that the refusal of the adjournment sought by the appellant's counsel at his hearing prevented the appellant from presenting all the available evidence.

### **Background to the appeal**

3. The appellant's appeal was set down for hearing on 25 October 2018. It was not disputed that the appellant only received notification of his appeal hearing on 27 September 2018. He sought to obtain solicitors who could obtain public funding. He had been unable to do this until very recently.
4. Mr Jafar, who represented the appellant at the hearing on 25 October, informed First-tier Tribunal Judge Stedman that he had not had sufficient time to obtain evidence or to prepare a statement and instruct an expert. Further, there was country material which had not been provided. The application for an adjournment was opposed.
5. Judge Stedman refused the adjournment. He stated that the appellant had solicitors on file and was represented by experienced counsel. He was able to advance whatever evidence he wished at the hearing. Counsel was able to submit any objective information at the hearing, which he put back until 2pm. He was satisfied that the appellant would not be deprived of a fair hearing.
6. Counsel was given the opportunity to submit further country evidence which was not opposed by the respondent. Judge Stedman stated that "ultimately there was no information that the appellant could not present at his appeal or submit at a later time and he was represented" [8].
7. Mr Jafar noted in the grounds of appeal that the appeal was set down for hearing on 25 October 2018. The appellant informed his solicitors that he was unable to obtain funding and therefore wished them to continue to represent him. They in turn informed the appellant that they would need to seek an adjournment as there was insufficient time to prepare for the hearing.
8. Accordingly, on 24 October 2018, which was the day prior to the hearing, the solicitors instructed him to make an application for an adjournment.
9. He informed the Judge that he had been unable to take full instructions from the appellant. Mr Jafar informed me that the appellant only speaks Arabic, which he cannot speak. There was no interpreter available to assist him. He was unable to take a witness statement from the appellant. Further, he did not at that stage know precisely what the appellant's case was.
10. He informed the Judge that he wished to obtain full instructions as well as prepare a statement and bundle of evidence, and in particular wished to instruct an expert to comment on procedures regarding military service in Egypt, which was a significant component in the appeal. Mr Jafar stated he tried to obtain instructions and prepare the case before 2pm, but was unable to obtain proper instructions.
11. He referred to paragraph [26(vi)] of the decision: Judge Stedman found that the appellant's failure to produce any documentation as he might reasonably be expected to obtain, for example documentation about his military service or at the very least a letter from his family describing the visits by the police, to be highly damaging in his case. His evidence relating to visits by the authorities to his family

was vague and lacking in detail. He gave the impression that he was making up his evidence.

12. He went on to find that in the light of the country evidence which was produced to him and which he set out, it is highly probable that the appellant has either completed his military service or paid a bribe, or used connections to either get out of completing his military service or to undertake a lesser role. It was not for him to speculate on what exactly had transpired in the appellant's life, but on the background evidence that seemed to be the most feasible assessment. It was difficult to understand, having considered the background material, if he did not complete his military service how, he otherwise would be able to leave the country – [27]. He thus made an adverse credibility finding against the appellant.
13. Mr Jafar submitted that in accordance with the principles set out by the Upper Tribunal in Nwaigwe (Adjournment: Fairness) v SSHD [2014] UKUT 418, the appellant has been deprived of his right to a fair hearing following the refusal of his application for adjournment. The test is simply one of fairness: was there any deprivation of the affected parties' right to a fair hearing.
14. He referred to the Court of Appeal decision in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 which reiterates the centrality of procedural fairness, especially in asylum cases. At the heart of that case was a challenge to the Immigration Judge's refusal to adjourn to admit independent expert evidence. As to the correct legal test to be applied, the court held at [14] that where an applicant seeks to be allowed to establish by contrary evidence that the case against him was wrong, the question will always be, whatever stage the proceedings have reached, 'What does fairness demand?'
15. Mr Jafar submitted that the refusal of the appellant's application for an adjournment was not fair as the Judge at [26(i)] and [26(ii)], based adverse credibility findings on the basis that the appellant's evidence was inconsistent. Mr Jafar submitted that this was a complicated matter involving 'technical reasons' with respect to the obtaining of permission to study. This required the appellant to give proper instructions to his solicitor, who had yet to prepare a written statement.
16. The appellant however had to give evidence in a confused manner and was subject to a hostile cross examination. The Judge also found that his evidence was vague and lacking in detail, which, Mr Jafar, submitted, was inevitable as the appellant had not been allowed to prepare his evidence in detail before the hearing, as usual, through a written statement.
17. He noted that the Judge made an adverse credibility finding on the basis of the appellant's failure to provide further evidence, which was the very reason why he had applied for an adjournment.
18. In addition, Mr Jafar he submitted that First-tier Tribunal Judge Stedman erred in basing adverse credibility findings on assumptions as to how the Egyptian authorities would behave [26(ii-v)]. The adjournment was sought for the very

purpose of instructing an expert on those points where country expertise would be significant.

19. He submitted that given the scale of persecution carried out by the Egyptian government against its own population, as referred to in the judgment of the Court of Appeal in Macharia v Immigration Appeal Tribunal [2000] IMM AR 190 at 196, that there may be circumstances where, in the interests of justice, or for the effective disposal of the appeal, it would be proper to grant an adjournment, particularly in a case where it is the asylum seeker putting in further evidence. Throughout, the Tribunal has to bear in mind that an asylum decision has potentially grave consequences for the asylum seeker whose very life may be put at risk by an adverse decision.
20. Mr Jafar stated that although the case was put back to 2 pm, he had not had a proper opportunity to prepare the case for the reasons referred to. He was only able to receive limited instructions, as the appellant's English was very limited.
21. He submitted that in the circumstances, he had not been afforded a reasonable opportunity to prepare his case before he was called upon to present it. He referred to the decision of Lord Widgery CJ in R v Thames Magistrates' Court Ex Polemis [1974] 2 All ER 1219 page 1223(b): The opportunity to present a case to the Court is not confined to being given the opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called upon to present it.
22. Mr Jafar submitted that an inevitable outcome of not allowing the case to be prepared is that First-tier Tribunal Judge Stedman did not understand the case that should have been made. At [28] he found that prosecution for draft evasion does not amount to persecution. However, the appellant's case was not that he feared prosecution, but that he feared he would be required to engage in human rights abuses that were so systemic as a tool of government that it would be termed a crime against humanity. Accordingly the respondent's policy at page 24 of 33, published for the Home Office staff on 1 July 2016, applied.
23. I was informed by Mr Jafar that there was significant documentation that needed to be obtained and which has subsequently been obtained, which could make a material difference to the outcome of the appellant's appeal.
24. On behalf of the respondent, Mr Melvin adopted his Rule 24 response. He submitted that the Judge considered the application for adjournment at [7-8]. He granted counsel the opportunity of providing the Tribunal with any further objective evidence which they sought to rely on. He had regard to the decision in Nwagwe, supra, and was satisfied that when applying the test, the appellant would not be deprived of a fair hearing.
25. First-tier Tribunal Judge Stedman set out the respondent's position, as well as the appellant's evidence and the country information produced. His findings were based on the oral evidence from the appellant as well as submissions from counsel

[15-17]. Country information was considered from [18-22]. He 'drew conclusions' on the evidence at [29].

26. The appellant has been in the UK since October 2016, only making his asylum claim in March 2018 having been arrested as an overstayer. During his interview he stated that documents in support of the claim would be available from Egypt, but despite regular contact with his family, those documents have failed to materialise.
27. Mr Melvin submitted that it would have been against the interests of justice for this appeal to have been adjourned to enable legal aid funded expert reports to be obtained. It appears that no time limit was given, at the adjournment request, as what expert had been approached, nor any timescale in which the report could be commissioned or what the expert might bring to the appeal.
28. He submitted that the decision is properly reasoned and the findings are based on the uncontested objective evidence provided, combined with the Judge's review of the appellant's evidence to the challenges raised in the reasons for refusal.
29. In reply, Mr Jafar accepted that there might have been mistakes made by both him and his solicitors. There had been nothing like the kind of preparation that is required in a case such as this. He did not have a set of instructions and his communication with the appellant was very limited. No application had been made prior to this for an adjournment. In the circumstances, the Judge should have done more than simply state that the objective material can be provided within a few hours.
30. Mr Jafar again submitted to the Tribunal that the objective evidence which he wished to make available to the Tribunal, is available.

### Assessment

31. The appellant's asylum claim was refused by the respondent on 11 September 2018. Following the refusal, he appealed against the decision. In his grounds of appeal it was noted that the decision was sent by post on 13 September 2018.
32. The chronology presented by Mr Jafar has not been disputed: notice of hearing was given to the appellant and his solicitors on 27 September 2018. They were informed that the hearing of the appellant's appeal would be heard on 25 October 2018.
33. Following receipt of the notice of hearing, the appellant unsuccessfully sought to obtain legally aided solicitors to represent him at the appeal.
34. He informed his solicitors that he was unable to obtain funded solicitors and requested them to continue to represent him. The solicitors informed him that they would then seek an adjournment as there was insufficient time to prepare for the hearing.
35. On 24 October 2018 - the day before the scheduled hearing - the solicitors instructed Mr Jafar to apply for an adjournment. He was only instructed the day before the hearing.

36. Mr Jafar did not receive a witness statement or from the solicitors. His only instructions were to apply for an adjournment.
37. In making his application, he informed the First-tier Tribunal that time was needed to afford the appellant an opportunity to prepare a proper statement and to provide a bundle of evidence. He also sought the adjournment in order that an expert witness could be instructed, relating to the 'technicalities' of military service in Egypt. This was necessary for the effective presentation of the appellant's appeal. He also needed to advise his solicitors to obtain relevant evidence from the country of origin.
38. Mr Jafar stated that it had not been possible to obtain a proper, or any, statement from the appellant during the few hours given to him after his adjournment application was refused. He did not have the benefit of an interpreter at the time. The appellant was barely able to speak English to a standard which enabled Mr Jafar to prepare a proper witness statement. Mr Jafar frankly stated that he was still not aware of the full nature of the appellant's case.
39. I have had regard to some of Mr Melvin's telling points, including his submission that the appellant has been in the UK since October 2016 and only made his asylum claim some one and a half years later, after being arrested as an overstayer. Although noting that there were documents available from Egypt, and that he was in contact with his family in Egypt, the documents were not produced.
40. Mr Jafar noted that adverse credibility findings were made against the appellant. He submitted that the procedure in obtaining permission to study in Egypt at the time, as well as the passport that was arranged for the appellant at the time, involved "highly technical procedures." Proper instructions had not been taken from the appellant by his solicitors. No written statement setting out the detail and nature of his case had been prepared. In the circumstances, Mr Jafar informed me that in the event, the appellant was simply cross examined without having made a statement setting out his case. There was no evidence in chief.
41. In the circumstances, the Judge's finding that the appellant's evidence was vague and lacking in detail is not surprising.
42. Judge Stedman made adverse credibility findings on the basis that the appellant had not produced further evidence from Egypt. That however had been one of the reasons why the adjournment was sought, namely, to obtain such evidence. That included evidence relating to the military procedures for call ups to the army. Mr Jafar stated that the appellant sought to establish by country evidence that the case against him was accordingly wrong.
43. It is also evident that Judge Stedman based adverse credibility findings on his assumptions as to how the Egyptian authorities would behave [26]. Again, an adjournment in order to instruct an expert to deal with those points had been refused. The appellant's case was however not that he feared prosecution but that he feared he would be required to engage in human rights abuses which were systemic as a tool of government.

44. In the circumstances, I find that the refusal of his adjournment deprived the appellant of his right to a fair hearing. As noted by the President (as he then was) in Nwaigwe, supra, the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably, but simply one of fairness.
45. The centrality of procedural fairness, especially in asylum cases, is also emphasised in SH (Afghanistan) v SSHD [2011] EWCA Civ 1284. The Court of Appeal noted that where the appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever the stage the proceedings have reached, what does fairness demand?
46. In the circumstances I find that the decision of the First-tier Tribunal involved the making of an error on a point of law.
47. The parties agreed that in the event of such a decision, the First-tier Tribunal Judge's determination should be set aside. They agreed that this was an appropriate case to be remitted to the First-tier Tribunal for a fresh decision to be made on all issues.

#### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside.

The case is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction not made.

Signed

Date 4 February 2019

Deputy Upper Tribunal Judge Mailer