Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/12945/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 May 2016	**On 18th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

SI

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Cheng, solicitor, Duncan Lewis & Co Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Mill (hereinafter referred to as the judge), promulgated on 25 February 2016. Permission to appeal was granted on 21 March 2016 by First-tier Tribunal Judge Shimmin.

Background

2. The appellant entered the United Kingdom during September 2009 with leave to enter as a Tier 4 migrant. His application for further leave in the same capacity was refused and his appeal against that decision dismissed. His appeal rights were exhausted as of June 2011. In August 2012 the appellant was encountered by immigration officers, identified as an overstayer and detained. He then claimed asylum and was, in due course, granted temporary admission. The appellant failed to attend five asylum interviews scheduled between 2013 and 2015. His interview ultimately took place during July 2015.

3. The basis of the appellant's asylum claim is that, during 2009, he was twice badly beaten by an individual, MM and his family, owing to the appellant's refusal to marry MM's sister. MM was said to be a local leader of the Awami League, whereas the appellant had a past affiliation with the Bangladesh Nationalist Party (BNP). In addition, MM had filed a false murder allegation naming the appellant, following which a warrant had been issued for his arrest. The appellant's family disowned him because of his failure to marry MM's sister. He then left Bangladesh in possession of the above-mentioned entry clearance to the United Kingdom. The appellant also provided documentary evidence indicating that he had been suffering from mental illness during his time in the United Kingdom.

4. The Secretary of State refused the appellant's claim principally owing to what were considered to be a number of implausible aspects, inconsistencies and his immigration history. The appellant's claimed suicide attempt was considered, however the respondent did not accept that the appellant met the tests in J v SSHD [2005] EWCA Civ 629 and Y (Sri Lanka) [2009] EWCA Civ 362.

5. On 17 February 2016, the date of the hearing before the First-tier Tribunal, those representing appellant provided his evidence to the respondent and Tribunal. An unsuccessful attempt was made to renew an adjournment application, in order to obtain an expert report as to the authenticity of the documents he had provided at his his asylum interview on 21 July 2015. The judge rejected the appellant's account, finding him to be a poor witness and his claim to be manufactured. The appellant's delay in applying for asylum and attending a substantive interview was also found to adversely affect the credibility of his claim. The judge found that there was no evidence to show that the appellant's mental state, described in reports as anxiety and mild depression, could not be treated in Bangladesh.

Error of law

6. Permission to appeal was sought on the basis of procedural unfairness; in that, firstly, the judge erred in failing to adjourn the appeal and secondly, that the appellant was not treated as a vulnerable witness in a number of respects. A statement from the solicitor (Ms Duszynska) who had appeared before the judge was appended to the grounds and contained a catalogue of complaints about the judge's conduct during the appellant's hearing.

7. The judge granting permission did so solely on the basis that it was arguable that the refusal of an adjournment in relation to the late service of the respondent's bundle revealed procedural unfairness. The second ground, ostensibly in relation to an asserted refusal to hold the appeal *in camera* was found by Judge Shimmin to be without merit and not to reveal an error of law.

8. The Secretary of State's response of 8 April 2016 stated that the respondent opposed the appeal as it was considered that the judge appropriately directed himself. An extract from a presenting officer's note of the hearing was set out which was relevant to the judge's refusal to adjourn. It was said that the refusal to adjourn was entirely proportionate.

The hearing

9. Mr Cheng relied on his skeleton argument, which focused on an assertion that the adjournment was sought in order to obtain up to date evidence of the appellant's mental state. He alluded to the litany of comments about the judge in Ms Duszynska's statement, however he moved his arguments on after accepting that permission had only been granted on the adjournment issue. Mr Cheng made much of the fact that the respondent's bundle had been erroneously served on Hammersmith & Fulham Law Centre, the appellant's previous representative. He was unable to point to any evidence to show that Duncan Lewis Solicitors had informed the Secretary of State that they were instructed in place of the Law Centre. Mr Cheng submitted that the documents provided by the appellant, which were in the respondent's bundle, would have taken Ms Duszynska by surprise at the hearing. He was unable to explain why this was so when she was previously acting for the appellant while he was a client of the said Law Centre. He contended that 2 and a half hours would not have been sufficient for Ms Duszynska to take instructions on the hearing day but conceded that there was no further application to adjourn as a result of the said insufficient time.

10. Mr Cheng argued that Duncan Lewis were unable to instruct an expert prior to February 2016 because of the appellant's mental state. He did not develop this argument. He maintained that Duncan Lewis did not have a copy of the screening interview, a medical report, lawyer's letters and political letters in the respondent's bundle. While explaining that he was not intending to "defend the conduct of a solicitor" Mr Cheng was unable to state why he was unable to point to any efforts made by Duncan Lewis to obtain the documents in the respondent's bundle, which were referred to, and indeed criticised, in the reasons for refusal letter.

11. Mr Bramble relied on the note of Mrs N Afzali, the presenting officer at the appellant's hearing. He argued that the purpose of the adjournment application was solely to obtain a report from Dr Hoque as to the authenticity of the appellant's documents. While Mr Bramble accepted that the respondent's bundle had been sent to the wrong representative, he argued that Duncan Lewis Solicitors already had all the information provided by the appellant including his detailed witness statement of July 2015, letters from political parties and newspaper articles which were contained in their own bundle which was submitted on the day of the hearing. He further argued that other documents relied upon by the appellant, such as an affidavit from his parents and the

lawyer's letter did not require an expert opinion as to authenticity.

12. Mr Cheng was unable to add anything of substance in response.

13. At the end of the hearing, I announced that the judge made no material error of law. My reasons are as follows.

14. I have had regard to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 regarding the power the First-tier Tribunal has to adjourn or postpone a hearing under its case management powers. Regard should have been had to the overriding objective set out in Rule 2 requiring the Tribunal to deal with cases fairly and justly.

15. I have also had regard to the decision in Nwaigwe (Adjournment: Fairness) [2014] UKUT 00418 (IAC). The crucial question being whether the refusal of an adjournment deprived the affected party of a right to a fair hearing. I have also taken into consideration the Presidential Guidance Note no. 1 of 2014 and note that factors weighing in favour of adjourning an appeal, even at a late stage, include whether 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. That is to be balanced by factors weighing against the grant of an adjournment, namely that the application was not made at the earliest opportunity or is speculative or that it does not show that anything material would be achieved by the delay. In this case, there is no evidence of any real effort being made to obtain an expert report at all over a period of some years or even in the months before the hearing when Duncan Lewis were acting for the appellant and therefore the lack of a report was not owing to circumstances outside the control of the appellant's representatives.

16. In SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 at [13], it was held that when considering whether an adjournment should have been granted, the test was not irrationality or whether the decision was properly open to the judge; the sole test was whether it was unfair. As stated in Nwaigwe, supra, in practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. The appellant in this case has not been so deprived.

17. The skeleton argument provided on the morning of the hearing before me argues, at [17] that the judge, "*by refusing an adjournment for the Appellant to obtain further medical reports, it is submitted that it prevented the Appellant from being able to provide the Tribunal with a full picture of his mental health condition*." The judge records at [6] of the decision and reasons that the purpose of the adjournment application is for an expert, Dr Hoque to provide a report focusing on the authenticity of the appellant's documents. It is apparent from the two earlier adjournment applications made in advance of the hearing that this was a renewed application. While I note the first adjournment application of 4 February 2016 made a reference to obtaining up to date medical evidence, that was not stated to be the purpose of the second written adjournment application made on 12 February 2016. The presenting officer's note states as follows; "*Rep requested an adjournment that has previously been refused on the papers. Rep wants to get an authenticity report*." Even the grounds of application make no reference to an adjournment being sought for a medical report. I therefore reject the content of the

skeleton argument relied upon by Mr Cheng in this regard.

18. Ground one of the application contends that there were documents in the respondent's bundle the appellant had either not seen or was not in possession of and he had not, therefore, had the opportunity to give instructions on them. I find it hard to accept that the appellant would not be familiar with any of the material in the respondent's bundle; principally material which he had provided; or that a period in excess of two hours would not be sufficient to discuss them in English, in which he is fluent, notwithstanding his diagnosis of anxiety and mild depression.

19. There were six appendices to the respondent's bundle consisting of the screening and substantive interviews, a lengthy witness statement from the appellant, documents submitted by the appellant, further submissions from Hammersmith and Fulham Law Centre and the decision itself. The appellant provided his documentary evidence at the substantive interview, following which he gave instructions to the Law Centre. His documentary evidence is referred to repeatedly throughout the Law Centre's subsequent representations as well as his own witness statement. It is not plausible that the Law Centre did not also discuss the interviews with the appellant. The fact is that there was no material in the respondent's bundle of which the appellant was unaware. My view is fortified by the presenting officer's note, which described what occurred after the adjournment application was refused; "*Rep then said she did not have R's bundle. The documents had been largely produced within the Appellant's bundle – there was nothing new but IJ gave a copy of R's bundle to rep and she had 2 and ½ hours to consider it. Rep confirmed she was ready to proceed*."

20. The difficulty with the argument in ground one is that no application for an adjournment was made on the basis that there was insufficient time to take instructions on the material in the respondent's bundle. Accordingly, the judge cannot be criticised for proceeding with the hearing in these circumstances, particularly when Ms Duszynska stated that she was ready to proceed.

21. The judge did not fall into procedural error in refusing the application to adjourn for the expert report. The presenting officer's note records that Ms Duszynska "*has been acting for Appellant before lodging the GOA*." Indeed Mr Cheng confirmed that she was previously working at the Law Centre in question. The Law Centre was acting for the appellant at the time of his substantive asylum interview in July 2015 when the appellant provided his documentary evidence. That evidence was subject to strong criticism in the refusal letter. While Duncan Lewis took over the matter from October 2015, at the latest, there was no evidence before me to show that any steps were taken to obtain an expert report at that stage or even after the notice of hearing dated 3 December 2015 was served. As the judge rightly records at [6], the appellant's asylum claim was made in 2012, based on events from 2009. Mr Cheng was unable to explain how the appellant's mental state prevented Duncan Lewis Solicitors from obtaining an expert report once they were instructed. There was no documentary evidence before the judge in the form of a letter of instruction to the expert. Nor was Mr Cheng able to respond to Mr Bramble's submissions in relation to the utility of such a report given

the particular documents provided by the appellant. That the appeal was not adjourned for an expert report did not render the proceedings unfair.

22. A significant reason for the judge concluding that the appellant's account was untrue was what was said at [21] of the decision which is reproduced below;

"At his screening interview in September 2012 the Appellant founded his asylum claim on the basis that it was his cousin's daughter that his family had requested he marry. He did not name (MM) or the alleged political influence he has nor crucially did he claim that he had been accused of a murder he did not commit….He now names MM as the father of the woman it was suggested he marry but that MM is not his cousin. This is significantly materially inconsistent.'

23. At [22] of the decision, the judge notes that the appellant denied ever having been subject to an arrest warrant or being wanted by any law enforcement agency during his screening interview, while that was the "*most significant part of the asylum claim presented at his asylum interview*." At [23] the judge considers the appellant's account of being able to leave Bangladesh for the United Kingdom openly and lawfully while there is a warrant of arrest for his murder outstanding, to be unlikely. At [24] the judge notes that notwithstanding his claim to be falsely accused of murder, the appellant continued his studies in the United Kingdom "unperturbed" by the claimed events for a considerable length of time between 2009 and 2012. He also comments, adversely, on the appellant's failure to claim asylum even when apprehended by an immigration officer and the claim being made subsequent to his immigration detention. Also noted is the lack of medical evidence to support the appellant's claim to have been too unwell to attend five asylum interviews arranged over a period of in excess of two years.

24. In view of the varied and powerful grounds provided by the judge for rejecting the appellant's claim, there is no basis for finding that even a favourable expert's report on the authenticity of the appellant's documents would have made a material difference to the outcome of this appeal.

25. The second ground of application was described by the judge granting permission to be "without merit" and to reveal no error of law. It is notable that no complaint was made about the judge's conduct other than in Ms Duszynska's statement attached to the grounds and accordingly, the judge has been unable to respond to the criticisms contained therein, Azia (proof of misconduct by judge) [2012] UKUT 00096(IAC) applies.

26. No anonymity direction was made by the FTTJ, albeit it was at the case management hearing stage. It is appropriate that this be continued and therefore the following anonymity direction is made:

"*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. "

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I uphold the decision of the FTTJ.

Signed Date: 18 May 2016

Deputy Upper Tribunal Judge Kamara