Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01763/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 July 2016	**On 21 July 2016**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Benfield, Counsel instructed by Theva Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 9 May 2016 of First-tier Tribunal Judge Chana. The decision refused the asylum claim of the appellant.

2. I make an anonymity direction in this case. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I make this decision on the basis of the risk of serious harm arising to the appellant from the contents of his asylum claim.

3. The first ground argued before me was that First-tier Tribunal Judge Chana erred in law in refusing an adjournment request. The judge's decision on the adjournment is at [22]-[29] of the determination and was as follows:

> "22. At the hearing Miss Tobin made an application for an adjournment on two bases. The first was that the appellant has informed her that he is not able to give oral evidence today as he has been vomiting since last night. He had to take a taxi to the hearing centre because he could not risk taking public transport in case he vomited. On the way to the hearing centre, he had to vomit. The second reason is that the appellant wishes to call his aunt who is able to give key evidence because she was the person who was contacted in the United Kingdom when the appellant was arrested and detained in Sri Lanka. No witness statement has been taken from her and she was not able to attend the hearing because of her work.
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> 23. I asked the appellant what was wrong with him and he said "Last evening I was shivering and cold. I live with my girlfriend who did not go to work as she usually does at 4PM. He took his depression pills but did not take his sleeping pill. He did not sleep last night. He came by taxi. He did not eat last night. I vomited in the morning and had to stop the taxi to vomit'. He said that he did not go to a doctor. He did not provide a receipt that he came by taxi.
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> 24. Mr MacRae said he would like to cross-examine the appellant and does not strongly oppose the application.
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> 25. I decided to hear my other appeal of the day so as to give the appellant time to settle down. At noon and after I had completed my other appeal, Miss Tobin renewed her application for an adjournment and said that although the appellant is no longer vomiting, he is not able to give evidence and it is her professional duty is to communicate that to me. The appellant was in court.
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> 26. I refuse to grant the adjournment request and took into account that 'The overriding objective of the Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of

the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest'. I also took into account that the Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined.

27. I took into account the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** where it was stated 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? See **SH (Afghanistan) v Secretary of State for the Home Department** [2011] Civ 1284.'

28. I was of the view that if the appellant was feeling so sick he would not have come to court this morning. I also took into account that he did not go to a doctor. I also took into account that no receipt had been produced that the appellant came to the hearing centre by taxi. When I questioned the appellant about it (sic) not being unwell, he answered the question without any difficulty whatsoever. In any event that (sic) took into account that the appeal is primarily about the appellant's credibility. I took into account that this appeal has already been adjourned once and it would be fair to the appellant to continue with it today. I also took into account that the appellant has given a very detailed witness statement which he could adopt as he was sitting in court. I was of the view that it would not be unfair to deprive the respondent of the right of cross-examination as I would take into account the detailed Reasons for Refusal Letter, the screening and asylum interview and could come to a fair decision.

29. I was of the view that it would not be unjust to determine the appeal without permitting the appellant a further opportunity to produce the evidence of his claimed aunt. I took into account that there was no witness statement from the witness and this was the first time that the appellant mentioned her existence even though his appeal has remained pending for a very long time. I also took into account that the appellant was inconsistent as to whether he had an aunt in this country at his asylum and screening interview. I was of the view that his aunt was an

> afterthought by the appellant and she does not exist because if she had such 'key evidence' to give, she would have been referred to earlier and a witness statement taken from her. No credible reason was given for why she could not attend court and why there was no letter from her saying so".

4. The appellant brings his challenge to the refusal of the adjournment on two heads, firstly on the basis that he was unwell and was deprived of the fundamental right of presenting his evidence orally at the hearing, and the second head being that the adjournment decision regarding the aunt was erroneous.

5. Turning to the first challenge to the adjournment request I am satisfied that an error of law occurred where the appellant's evidence before the First-tier Tribunal as to his illness was such that Judge Chana's reasoning at [28] cannot stand.

6. At [60] of the determination the judge records the following evidence from the appellant's partner:

> "60. His witness [AS] gave evidence through a Polish interpreter and adopted her statement dated 28 April 2016. She gave the following evidence in examination-in-chief, which I summarise. She is a Polish national. The appellant was not well yesterday evening. She was supposed to go to work at 3 p.m. and the appellant was lying in bed and not talking to her. She did not go to work and informed her boss. The appellant was being sick and she gave him antidepressants. In the morning he was sick as well. He was vomiting. They were meant to take a train to the hearing centre but took a taxi instead".

7. This evidence from the partner directly contradict the statement of Judge Chana at [28] that there was nothing before her supporting the appellant's claim to be unwell or that he had had to travel to the hearing by taxi. The partner's evidence supports his claim to be unwell the day before the hearing and on the day, to have vomited and to have had to travel by taxi.

8. It is therefore my view that Judge Chana failed to take into account evidence that was highly material to the adjournment request and, in my view, manifestly capable of making good the appellant's claim to be unwell and to require an adjournment in order to exercise his right to give evidence. I find error of law as a result such that the decision must be set aside and the appeal re-heard in order that the appellant has an opportunity to give evidence.

9. For what it is worth, I point out that I was provided on the day of the hearing before me with a medical note from the Luton NHS Walk-In Centre dated 29 April 2016, the day of the hearing before Judge Chana. It was issued after the hearing in the First-tier Tribunal and refers to the appellant having taken a "staggered OD of five x 7.5 mg Zopiclone tablets

three tabs taken last night two tabs taken at 7 a.m. Says he could not sleep as had court attendance today so took the pills". It will be obvious that this evidence further supports that of the appellant and his partner as to his health on the day of the First-tier Tribunal hearing.

10. On the second plank of the application regarding oral evidence from the appellant's aunt, it would appear from discussions with Counsel that a witness statement from the aunt was submitted in this matter at a previous hearing in 2015 so it may be that Judge Chana was misled as to how the aunt featured in previous litigation. It remains the case that nothing before me explained why the aunt was not present at the hearing on 29 April 2016. This ground did not have any merit as a result.

11. The parties were in agreement that given my error of law finding above, the determination had to be set aside entirely and remitted to the First-tier Tribunal to be heard *de novo* with no findings preserved. That appeared to me to be the correct approach where there are no extant findings of fact and the applicant must be given the opportunity to give oral evidence.

12. For these reasons the decision of the First-tier Tribunal is set aside for error of law and will be remitted to the First-tier Tribunal to be re-made.

Signed  Date 20 July 2016

Upper Tribunal Judge Pitt