Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
PA/02741/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision and Reasons Promulgated**
On: 8th August 2017	**On: 22nd August 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

HQ
(anonymity order made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Moffatt, Counsel instructed by the Legal Rights Partnership**
For the Respondent: **Mr Harrison, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellant is a female national of Pakistan born in 1975. She appeals with permission[1] the decision of the First-tier Tribunal (Judge Herwald) to dismiss her appeal on protection and human rights grounds.

[1] Permission granted on the 22nd May 2017 by First-tier Tribunal Judge Keane

Anonymity Order

2. This appeal concerns a claim for international protection involving allegations of sexual abuse. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

The Appeal Before the First-tier Tribunal

3. The Appellant claimed asylum on the 10th October 2015. At that point she had been living in the UK as an overstayer since 2003. The basis of her claim was that she had been subjected to serious domestic violence - including attempted rape – at the hands of her brother, a violent drug addict. She had come to the UK to stay with her uncle and aunt and in order to escape from him. She would be unable to return to her former home in Pakistan because her brother continues to exhibit violent hostility towards her (and indeed other women in the family) and there is now a land dispute going on. Because she is a single woman she would not be able to safely relocate within the country. The Appellant relied on her relationships and private life in the UK to also make a human rights claim on Article 8 grounds.

4. Her claim was rejected on the 1st March 2016. The Respondent did not accept the historical account, or that there was any current risk. She further found there to be a sufficiency of protection provided by the Pakistani state and submitted that the claim was defeated by the internal flight alternative available to the Appellant.

5. The Appellant appealed and on the 8th September 2016 she was notified that her hearing was due to take place on the 20th September 2016. Directions were made that any evidence that she wished to rely upon should be filed and served no later than 5 working days prior to the hearing date. On the 15th September 2016 the Appellant's representatives made an application for an adjournment. The basis of that request was that medical evidence had been sought but there

had been a delay in the doctor finishing her report. It would not be available until after the hearing date. The request was granted and fresh notices of hearing sent out, giving a new date, the 16th January 2017. The old directions continued to apply, those being that any evidence was to be submitted 5 days prior to hearing.

6. The 16th January 2017 was a Monday. On the preceding Wednesday, the 11th January, the Appellant's solicitors posted a bundle to the Tribunal. It arrived – at least it is stamped as received – on the morning of Friday 13th. On the afternoon of Friday the 13th January the Appellant's representatives faxed a further document to the Tribunal. This was a report prepared by Sarah Heke, Consultant Clinical Psychologist. The report is dated the 8th January 2017 but I note that an automatic entry on the final page shows that it was completed on the 9th. The covering letter from the Legal Rights Partnership simply states that the report is enclosed. No explanation is offered for its lateness, nor application made for it to be admitted into the evidence.

7. When the matter was called on before Judge Herwald, the Home Office Presenting Officer (HOPO) Mr Barrow informed the Tribunal that he had not had sight of the bundle or the psychologists report before 10am that morning. He objected to their admission. He said that he would not be able to consider them fully and properly unless there was an adjournment. Ms Moffatt for the Appellant accepted that neither the bundle, nor the report of Dr Heke, had been filed or served in compliance with directions. She apologised for the late delivery of the documents and explained that this was because the solicitor had been waiting for the report from Dr Heke. This had delayed the service of the bundle but on Wednesday, when the report had still not arrived, they had sent the bundle anyway. The report was faxed as soon as it was available. She asked that the documents be admitted, stressing their importance to the Appellant's case, and invited the Tribunal to accommodate Mr Barrow by adjourning the appeal or alternatively by putting the matter back in the list so that he might have time to fully prepare the case.

8. The Tribunal refused to adjourn. The HOPO was given time to read the witness statements, but the remaining evidence, including the report of Dr Heke, was excluded. The hearing proceeded and the Tribunal reserved its decision.

9. On the 20th January 2017 the Appellant's solicitors wrote to Judge Herwald imploring him to relist the appeal so that the totality of the evidence could be considered. The letter explained that Dr Heke had been unwell and enclosed emails showing that the firm had been chasing her for the completed report.

10. The determination is dated the 24th January 2017. The Tribunal acknowledges the difficulties that arose in respect of the late service

at paragraph 2(d) of the determination:

> "Ms Moffatt did not appear to have been aware that the case had been adjourned, at the request of those instructing her, back in September 2016. The Appellant's solicitors had written to the court to explain that they had instructed a psychologist on 26th August 2016 to prepare a report, to be available by 15th September. But the report had not been received by them. They requested a short adjournment, to allow the report to be finalised. And that led to the adjourned hearing today. It was therefore difficult to accept why those instructing Ms Moffatt had left it right to the last minute before securing the psychological report, and before submitting it to the court. I was satisfied that the bundle could have been submitted timeously, and if necessary, the psychological report could have followed. I allowed Ms Moffatt time to take instructions, noting that if the matter had to be adjourned today, that would mean a very lengthy delay, which would not be in the interests of justice, and would not be in the emotional interests of the Appellant, probably. Having heard further submissions from Mr Barrow, I resolved not to admit the full bundle, as this would effectively mean that he would have been ambushed by the Appellant's representatives. Instead, I agreed to admit only witness statements of the Appellant, and her witness, consisting of only 27 pages, which it would be possible for Mr Barrow to read and consider before the hearing. I considered this a fair balance of the Appellant's rights to a fair trial, to the Respondent's rights to be able to reply to assertions by the Appellant, and was satisfied that accorded with the Tribunal's overriding objective and that this would not prevent the just disposal of the appeal".

11. The First-tier Tribunal went on to dismiss the appeal. The Appellant's evidence about why she had not sought protection at an earlier juncture is rejected as "verging on the fanciful", and her claim to fear her brother is (apparently) rejected on the grounds that she returned to Pakistan on two occasions having visited the UK in 2000 and 2001. The appeal is dismissed on the grounds that there would be a sufficiency of protection for the Appellant in Pakistan, and that she could avail herself of an internal flight alternative in that huge country.

The Challenge

12. The grounds of appeal focus on the First-tier Tribunal's refusal to adjourn the appeal. I intend no disrespect to Ms Moffatt's grounds in

recording that they are well summarised by First-tier Tribunal Keane in granting permission:

> "the consequence of the Judge's exercise of discretion was to deny the appellant a right to rely on cogent evidence which might materially have borne on the outcome of the appeal namely a psychological report which diagnosed the appellant as suffering from the psychiatric condition known as post-traumatic stress disorder, declarations from her mother in sister which corroborates her version of events, documentary evidence corroborating many aspects of her account and background evidence. the judge's exercise of discretion deprived the appellant of the right to rely on all such evidence. The judge's decision to refuse the request for an adjournment was arguably unfair and arguably deprived the appellant of a fair hearing".

Discussion and Findings

13. What was the evidence that the First-tier Tribunal refused to admit? The first tranche ran from page 28 to 242 of the Appellant's bundle. It is little wonder that Mr Barrow felt unable to deal with it 'on the hoof'. Of the 47 items excluded, 39 were documents that went directly to the Appellant's case (in addition to 8 country background reports). These documents were capable of verifying several aspects of the Appellant's evidence: there was for instance an invoice from a drug rehabilitation unit relating to the man identified as her brother, sworn statements from members of the Appellant's family which describe her brother as "evil", an attested statement from an advocate of the High Court who personally knows the family and has had long involvement in the case, court documents relating to the alleged land dispute, photographs of scars and an invoice from an immigration law advisor in Blackburn, adduced to demonstrate that the Appellant had earlier sought advice as claimed. The psychologist report was prepared in January 2017, the doctor having first seen the Appellant in September 2016. In headline summary, Dr Heke diagnosed the Appellant with Post-Traumatic Stress Syndrome and depression, opined that return to Pakistan would have a highly detrimental impact on her emotional well-being and mental health, found her poor mental health to have a negative impact on her social functioning, and found that forced return to Pakistan would increase her risk of suicide, albeit that this was a low risk at present.

14. It is Ms Moffatt's case that these documents were of such obvious relevance to the Appellant's case that fairness plainly required their admission. She points out that under the Tribunal Procedure (First-

tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 the discretion is a wide one. The Tribunal may take such action as it considers just. The delay in lodging was admitted, and regretted, but an explanation had been offered. There had been a delay in September because the psychologist had been out of the country; approaching the January hearing she had been unwell. Email correspondence between the solicitors and the psychologist in respect of both hearings had been produced. She submitted that the Tribunal does not appear, in its exercise of discretion (reflected in the reasoning at paragraph 2(d)), to have considered the potential relevance of any of the excluded documents, nor to the diligence with which those instructing her had pursued the report from Dr Heke. The finding that an adjournment would "probably" have been contrary to the emotional interests of the Appellant was speculative; the Tribunal did not appear to investigate whether an adjournment would in fact have resulted in a "very lengthy delay". Finally, and most importantly, the Tribunal does not appear to have given any weight to the most obvious point: that it was the Appellant, entirely innocent of wrongdoing, who suffered the consequences of his decision.

15. In her grounds Ms Moffatt relies on the decision in AK (Admission of Evidence - Time limits) Iran [2004] UKIAT 00103. Therein a Vice-Presidential panel of the Upper Tribunal considered a case where an immigration adjudicator had refused to admit a late bundle of evidence in an asylum case, in the context of the then applicable procedure rules:

> 12. However, the understandable desire on the part of adjudicators and this Tribunal to enforce due compliance with such directions and provisions must be balanced against the competing requirement to ensure that justice is done in a jurisdiction in which appeals routinely require the "most anxious scrutiny", and in which the issues at stake frequently involve matters of life, limb and liberty. There is an inevitable tension between those conflicting interests.
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> 13. Whilst there may be individual cases in which it would be right for an adjudicator to exclude material, or potentially material, evidence on which party (normally the appellant) wishes to rely by reason of the failure by that party to file or serve the evidence in time, nevertheless as a general principle, the requirement to ensure that justice is done in appeals requiring the most anxious scrutiny will in most cases outweigh the understandable desire on the part of the Immigration Appellate Authority to ensure that its directions and the provisions of the Procedure Rules are not flouted with impunity.

> 14. In the present instance, we are satisfied that the late evidence which the appellant sought to adduce before the adjudicator, and which the adjudicator refused to consider because it had not been filed in time, was *prima facie* material evidence which, if it had been considered by him, *might* (we put it no higher than that) have resulted in the adjudicator arriving at a different conclusion in relation to the credibility of the appellant's evidence. In the circumstances, his decision to exclude that evidence from consideration was one which he ought not to have taken.

16. See to similar affect MD (Pakistan) [2004] UKIAT 00197 at paragraph 15. More recently the President of this Tribunal, Mr Justice McCloskey, has given guidance on the approach to be taken in cases where adjournment refusals, made under the current procedure rules, are reviewed on appeal. In the decision in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) he stressed that the standard of review is not one of reasonableness (ie whether it was a decision rationally open to the Tribunal) but rather one of fairness. If it could be established that there was any deprivation of a party's right to a fair hearing, the decision must be set aside:

> *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] EWCA Civ 1284.*

17. The President stressed that where confronted with the competing interests of expediency and fairness, it is the latter that must prevail:

> "As a general rule, good reason will have to be demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its

> emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right of every litigant to a fair hearing, is engaged. In any case where a question of possible adjournment arises, this is the dominant consideration".

18. Examples of the President putting his own guidance into practice can be seen in Shabir Ahmed and others (sanctions for non – compliance) [2016] UKUT 00562 (IAC) and VA (Solicitor's non-compliance: counsel's duties) Sri Lanka [2017] UKUT 00012 (IAC), both cases in which the common law right of the litigant to a fair hearing satisfied the Tribunal that an adjournment of proceedings was necessary, notwithstanding egregious breaches of the procedure rules by that litigant's lawyers. See for instance the following passage in VA:

> "The Tribunal was blackmailed in this case by the Appellant's representatives on a previous date, 14 July 2016. The order of that date is attached. This is aptly described as "blackmail", in the figurative sense, because while the Tribunal could have refused to adjourn the hearing and insisted upon proceeding, this was in truth a theoretical possibility only given the virtual inevitability that any constitution of the Tribunal would have given paramount importance to the Appellant's right to a fair hearing – in this discrete context, a professionally prepared and properly presented hearing".

13. I am satisfied that in this case, the material that was excluded from consideration was obviously pertinent to the Appellant's case. That this is so is demonstrated by the Tribunal's own findings. The Tribunal rejected as "fanciful" the Appellant's claim to have earlier sought advice about her position in the UK; the bundle contained documentary evidence confirming the same. The Tribunal found that as a woman on her own the Appellant could reasonably be expected to live somewhere away from her family in Pakistan; the bundle contained objective country material to the contrary, and Dr Heke gave several reasons why this would be extremely difficult for her. The Tribunal – although clear findings are not made - appeared to doubt the entire account; the bundle contained numerous statements and items of documentary evidence which arguably corroborated the Appellant's case.

14. I entirely agree with Mr Harrison that the HOPO on the day was in an extremely difficult position. There was realistically no way that the

Respondent could have fairly prosecuted *her* case without Mr Barrow having at least a few hours to prepare and assess the materials he was presented with at 10.00am that day. The most obvious, and fair, solution would have been to adjourn. The Tribunal was understandably reluctant to do so for the reasons that it sets out at paragraph 2(d) of its determination, but the *paramount consideration* was one of fairness. I cannot be satisfied that this was the approach taken by the Tribunal, nor one reflected in the resulting determination.

15. I need say no more about the matter since before me the Respondent agreed that there was a procedural unfairness in the hearing of the appeal and invited me to remit the matter for hearing *de novo* before the First-tier Tribunal.

Decisions

16. For the reasons set out above I am satisfied that the decision of the First-tier Tribunal is flawed for a material error in approach. The decision is set aside.

17. The decision is to be remade in the First-tier Tribunal

18. There is an order for anonymity.

Upper Tribunal Judge Bruce
22nd August 2017