Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05585/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 16 October 2017	**On 01 November 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MAA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Olphert, instructed by Maher & Co, Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the

appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Pakistan who was born on [ ] 1988. He first arrived in the United Kingdom on 25 January 2011 with entry clearance as a Tier 4 Student valid until 30 April 2013. Further applications for leave were refused in 2013 and 2015. On 2 April 2017, the appellant was encountered and served with a removal decision (RED.0004) and detained.

3. On 6 April 2017, the appellant claimed asylum. He claimed that he had been falsely accused of being gay by his brother-in-law as a result of his refusal to marry his brother-in-law's sister. He claimed that warrants for his arrest had been issued and there was a fatwah.

4. On 7 June 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds under the ECHR.

5. The appellant appealed to the First-tier Tribunal. Judge Housego dismissed the appellant's appeal on all grounds. Whilst he accepted that the appellant's brother-in-law was angry about the appellant not marrying his sister, he rejected the remainder of the appellant's account and that he would be, as a consequence, at risk on return to Pakistan. In addition, the judge found that the appellant would obtain effective protection from the Pakistan state and could internally relocate.

6. The appellant sought permission to appeal to the Upper Tribunal and permission was granted by the First-tier Tribunal (Judge Keane) on 25 July 2017.

7. On 7 August 2017, the Secretary of State filed a Rule 24 notice seeking to uphold the judge's decision.

The Appellant's Case

8. On behalf of the appellant, Mr Olphert relied on three grounds.

9. First, he submitted that the proceedings were unfair as the judge had refused to adjourn the hearing in order that the appellant could obtain new legal representatives; his previous representatives having ceased to act for him on 23 June 2017 shortly before the appeal hearing on 3 July 2017.

10. Secondly, the judge was wrong in law not to apply the approach in HJ (Iran) v SSHD [2010] UKSC 31 in determining whether the appellant had established a well-founded fear of persecution on the basis that he would be perceived to be gay.

11. Thirdly, the judge erred in law in applying out of date guidance from the Home Office in finding that there would be effective protection and internal relocation was possible.

Discussion

12. The principal ground relates to the fairness of the proceedings before the judge.

13. The position put forward at the First-tier Tribunal hearing by the appellant, who was unrepresented at the hearing, was that his previous solicitors (Prestige Solicitors) had stopped acting for him on 23 June 2017 because he was unable to pay £2,000 for a barrister. The appellant was in detention and had approached the welfare department and had booked an appointment with a new firm of solicitors (Duncan Lewis) for 5 July 2017. The appellant sought an adjournment in order to obtain legal advice, which he said would be available on legal aid from Duncan Lewis, and pointed out to the judge that he had not prepared a witness statement and, although two witnesses had attended the hearing, there were no witness statements in relation to them.

14. The judge dealt in some detail with the appellant's application for an adjournment at paras 19-23 of his determination as follows:

> "19. The appellant applied for an adjournment. He said that his solicitor had made a lame excuse and let him down last Thursday, saying that he needed more money. He had an appointment with a new solicitor. He requested an adjournment to be able to be represented. He had 2 witnesses who had attended today. He had an appointment with a solicitor for 05 July 2017. The solicitor had been Prestige Solicitors Manchester who said they needed time to prepare the case. He now had an appointment booked with Duncan Lewis. I asked for the appellant's comments on a letter contained in the Tribunal file, dated 23 June 2017, stating that they had received no further instructions from the appellant and so were unable to proceed with representing him. The appellant said this was not the case. They said they wanted more money. Duncan Lewis would deal with the matter on legal aid. Prestige Solicitors had let him down and refused to come without more money. This was £2000 to pay for a barrister. He would not have to pay this if he used Duncan Lewis.
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> 20. The Home Office Presenting Officer opposed this application. The appellant had ample time to prepare. There was nothing to say that Duncan Lewis had accepted instruction from the appellant. The appellant was able to give his evidence and his witnesses were already in attendance. Cross examination would be brief. One had only to look at the immigration history. The appellant had come in 2008 and claimed asylum only after being detained. This was a stalling tactic.
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> 21. I enquired of the appellant whether he had told Duncan Lewis of the hearing today. He had not. He had been to the welfare department and booked an appointment, which was on 05 July 2017.
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> 22. I declined to adjourn the hearing. The appellant had his witnesses present. There was nothing from Duncan Lewis to say that there were instructed. There was no complex law in this case, for the Home Office case was about credibility. There was a public interest in getting appeals such as this heard swiftly.
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> 23. The appellant said that he needed more time and had not prepared a witness statement and although he had witnesses he was not able to proceed. I indicated that I had decided the hearing would proceed."

15. Mr Olphert relied on the fact that the appellant was in detention and had had difficulties dealing with his representatives. He had been let down at the last moment by Prestige Solicitors and he had an appointment fixed for two days after the hearing. His case had not been properly prepared but this was not a case where the appellant was 'sitting on his hands' and it was unfair in the circumstances to proceed.

16. Mr Richards, who represented the Secretary of State submitted that the proceedings were not unfair. Mr Richards submitted that the judge had conflicting accounts as to why the appellant was no longer represented by Prestige Solicitors. There was no evidence that Duncan Lewis had been instructed other than that an appointment had been fixed with them. Mr Richards relied upon para 24 and 25 of the determination where, he submitted, the judge had been scrupulously fair in reading through the interview and ensuring that the appellant understood the proceedings.

17. The First-tier Tribunal Procedure Rule (the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604)) provide in the case management powers in rule 4 at rule 4(3)(h) that the First-tier Tribunal may "adjourn or postpone a hearing". Those case management powers are subject to the overriding objective set out in rule 2 to deal with a case "fairly and justly".

18. It has been recognised both in relation to the present 2014 Rules and the previous Rules applicable in the First-tier Tribunal that the legality of the exercise of discretion not to adjourn a hearing must be measured by the requirements of "fairness", rather than the reasonableness or rationality of the decision not to adjourn (see, e.g. Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) (McCloskey J)). There is no "inalienable right to representation" (see AK (Iran) v SSHD [2008] EWCA Civ 941 at [25]). Each case must necessarily be fact-sensitive having regard to all the circumstances, including the conduct of the appellant and the issue raised in the appeal.

19. Here, the evidence before the judge was at least consistent with the appellant having been "dropped" by his previous representatives (Prestige Solicitors) because he was unable to put them in necessary funds to pay for a barrister. The letter from Prestige Solicitors dated 23 June 2017 addressed to the Tribunal stated that: "we write further to receiving no further instructions from our client and therefore are unable to proceed with representing the above mentioned individual." That letter is not inconsistent with the appellant's claim that Prestige Solicitors declined to represent him because he could not provide the funds to pay for a barrister. Indeed, the 'legal speak' that they had received "no further instructions" from the appellant is consistent with the appellant's explanation given to the judge.

20. In addition, the appellant was in detention. That necessarily impacted upon his ability to instruct lawyers and to prepare his own appeal.

21. Further, the material before the judge did not suggest that the appellant had been dilatory or, as the HOPO submitted before the Judge, had sought an adjournment as

a "stalling tactic". He had sought to contact new potential representatives (Duncan Lewis) after his previous solicitors withdrew on 23 June 2017 and had arranged an appointment for two days after the hearing.

22. The issues in the appeal were not legally complex but the appellant's credibility was in issue and it is clear from the judge's Record of Proceedings that he was subject to sustained cross-examination by the HOPO. He was undoubtedly disadvantaged because no witness statement had been prepared for him and, as appears from the judge's determination, there were no witness statements for the two witnesses who spoke on his behalf. The interview notes were not, in form or substance, a wholly adequate substitute for a witness statement from the appellant. Although, at para 24 the judge took the interview notes as representing the appellant's witness statement, even if the notes were correct and the appellant did not wish to amend them, their fullness and form fell short of what might be expected of a professionally prepared witness statement. There was, of course, no possible substitute for a witness statement in relation to the other two witnesses.

23. There had been no previous adjournment of the appeal. Indeed the appeal was heard less than one month after the claim was refused on 7 June 2017.

24. The appellant, in my judgment, found himself unexpectedly without representation at the hearing. In AK (Iran), Sedley LJ (with whom Waller and Dyson LJJ agreed) said at [30]: "… it must be very rarely that an Immigration Judge can legitimately decide that representation and advice could not possibly improve an appellant's case." It is apparent to me that professional representation would have been, at least, of some benefit to him. He had at least the possibility of obtaining legal representation in the near future.

25. In the circumstances of this case, I am satisfied that it was unfair for the judge to proceed to hear the appeal, rather than grant an adjournment, which would in all likelihood have been of a relatively moderate length, in order for the appellant to obtain legal representation to present his case in its best light.

26. Having reached that conclusion, the only possible disposal of this appeal is to set aside the First-tier Tribunal's decision and to remit it to the First-tier Tribunal for a fresh hearing before a different judge.

27. It is not necessary, therefore, to address in any detail the other two grounds relied upon by the appellant as they are immaterial to the disposal of the appeal. However, I would note that it does appear that the judge applied the out-of-date *Country Information and Guidance Policy* at para 58 (which was against the appellant's case), rather than the up-to-date policy guidance set out at para 10 of the appellant's grounds (which was in favour of the appellant's case) in respect of sufficiency of protection. The remaining ground, relying upon HJ (Iran) has no merit given the judge's adverse credibility finding, which is not challenged in the grounds, that he did not believe that the appellant's brother-in-law had falsely accused him of being

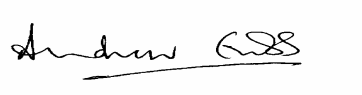
gay. The appellant's claim, therefore, to fear persecution as someone who would be perceived as gay simply could not succeed.

Decision

28. For the reasons I have given the decision of the First-tier Tribunal involved the making of an error of law and that decision is set aside.

29. Having regard to para 7.2 of the Senior President's Practice statements, the appellant has not had a fair hearing and is entitled to a *de novo* hearing before the First-tier Tribunal before a judge other than Judge Housego. The appeal is remitted to the First-tier Tribunal on that basis.

Signed



A Grubb
Judge of the Upper Tribunal

30 October 2017