



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/05671/2018

THE IMMIGRATION ACTS

**Heard at Manchester
On 16 October 2018**

**Decision & Reasons Promulgated
On 23 October 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

**SM
[Anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms S Anzani, instructed by York Solicitors

For the respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Bannerman promulgated 18.6.18, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 18.4.18, to refuse his claim for international protection.
2. First-tier Tribunal Judge Feeney granted permission to appeal on 13.7.18.

Error of Law

3. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside to be remade afresh.
4. The appellant's representatives were instructed on 30.4.18. As late as two days before the date of the appeal hearing, they sought an adjournment in order to obtain a scarring report. Their letter of 29.5.18 explained that since the receipt of the Notice of Hearing, issued on 3.5.18, they had been trying their best to obtain such a report, attaching two letters to experts, dated 15.5.18 and 22.5.18. However, none of the experts approached could prepare the report within the available timeframe before the hearing.
5. The application was refused by the Designated Judge, pointing out that the appellant arrived in the UK in 2013 and knew from then that the issue of scarring was in dispute. The decision of the Secretary of State was not made until 18.4.18 but this was because the appellant had absconded. The judge considered that there had been ample time to obtain the necessary report and there was already one report dealing with the scarring.
6. The adjournment application was renewed at the appeal hearing. For the reasons set out between [29] and [40], the application was again refused.
7. The judge went on to dismiss the appeal, based at least in part on the conclusion that it was not believed that the appellant sustained the scarring in the manner claimed and consistent with his factual claim on risk of mistreatment on return.
8. In granting permission, Judge Feeney found it arguable that the judge erred in failing to grant an adjournment in order for the appellant to obtain a scarring report, stating that although there are strong practical and case management reasons for dealing with cases expeditiously, in refusing the adjournment request the judge did not take into account the materiality of the evidence sought and that it could assist in determining a central issue in the case, applying Nwaigwe (adjournment fairness) [2014] UKUT 00418 (IAC).
9. It is clear that the First-tier Tribunal Judge did not address the materiality of the evidence sought. Whilst an existing report detailed the scarring, it did not address the causation of those scars. Given that the judge rejected the appellant's explanation for the scarring and that this was fundamental to the appellant's credibility, it follows that the absent evidence was potentially crucial to the appeal. In Nwaigwe, the Upper Tribunal held that considerations of efficiency and expediency "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."

10. I find that the judge approached the adjournment issue in a way that amounted to a material error of law and resulted in unfairness to the appellant. Mr Tan indicated in his submissions that he would struggle to identify where the judge had considered the issue fairly to the appellant. In the circumstances for this reason alone the appeal cannot stand and must be set aside.
11. Ms Anzani addressed a number of other of the grounds of appeal of lesser significance, none of which I found made out. For example, I found no error of law in respect of the claim that the judge made inconsistent findings or made a material misdirection in law in the approach to article 8. On a proper reading of the decision, neither do I accept the submission that there is necessarily any inconsistency between [108] and [116] of the decision. The judge accepted that the appellant previously left Sri Lanka by sea so would not have gone through immigration control. However, it was the appellant's own case that he left using his own passport.
12. Neither did I accept the submission that in addressing the issue of family life between the appellant and his brother at [135] that the judge took into account an irrelevant consideration when stating that the brother had been found not to be credible. It is clear from [136] that the judge was assessing the extent of the claimed dependence on the brother and thus credibility of the brother and the appellant as to this issue was relevant.
13. Given the findings above in relation to the refusal of the adjournment request, it is not necessary for this tribunal to address the other more minor alleged errors of law.

Remittal

14. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
15. Given that the appellant will now have the opportunity to obtain a scarring report, it is clear that all the credibility findings will need to be addressed afresh. Given the time required for a report to be commissioned and delivered it is not appropriate to retain this case in the Upper Tribunal.
16. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I

find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the directions below.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

18. The appeal is remitted to the First-tier Tribunal sitting at Manchester;
19. The appeal is to be decided afresh with no findings of fact preserved;
20. The ELH is 4 hours;
21. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Bannerman and Judge Feeney;
22. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. However, I consider it appropriate to do so.

Direction Regarding Anonymity

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 his 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.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable so no fee award can be made.



Signed

Deputy Upper Tribunal Judge Pickup

Dated