



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09338/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 11th June 2018

Decision & Reasons Promulgated
On 13th June 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan, Counsel instructed on behalf of the Appellant

For the Respondent: Ms Ahmed, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

1. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 21st November 2017, dismissed his claim for protection.
2. The Appellant's immigration history is set out within the determination at paragraphs 1-3, and in the papers before the Tribunal. On 25 March 2016 he was encountered at Dunkirk attempting illegally to enter the United Kingdom but was removed. He was encountered again on 13 July 2017 working illegally in a restaurant in London and claimed to have entered the United Kingdom in April 2016. He claimed asylum on 15 July 2017 and it appears that he was then detained; a screening interview was concluded on 8 August 2017 and on 15 August 2017 a Rule 35 report was compiled. On 21 August 2017 he attended his substantive asylum interview and further submissions were made on his behalf on 29 August 2017.
3. The Respondent refused his protection claim and claim on human rights grounds in a decision letter dated 14 September 2017. The factual basis of this claim was that he was in fear from the Taliban and feared being killed on return to Afghanistan because his father and Uncle were members of the Taliban and the Appellant had refused to join them. Central to his claim was that his father and uncle had handed him and his brother to the Taliban at night and they had been held for about 25 days and during that time he was subject to ill-treatment and injuries were caused to him. The Respondent in the decision letter made reference to inconsistencies in the Appellant's factual account thus it was not accepted that he faced problems from his father, uncle and the Taliban in Afghanistan. In the alternative, it was noted that there was sufficiency of protection and he had the option to relocate internally to Kabul. The decision also made refused his claim on Article 8 grounds, both under the Rules and outside of the Rules.
4. The Appellant appealed that decision having submitted grounds of appeal on 20 September 2017. The hearing came before the First Tier Tribunal 25 October 2017. In a determination promulgated on 21 November 2017 the judge dismissed his claim for protection and found the core of his claim not to be credible; that he had not shown to the required standard that he had a well-founded risk of persecution for a Convention reason. The Judge also found that he could be returned to Kabul applying the then CG decision of AK (Article 15 (c)) CG [2012] UKUT163. Thus the judge dismissed his appeal.
5. The Appellant sought permission to appeal that decision and permission was granted by the First-tier Tribunal Judge Ford on the 22nd March 2018 as follows:

"it is argued that the Tribunal erred in refusing an adjournment. See paragraph 15 and 16. It is arguable that given the inadequacies of the s35 report as detailed at paragraphs 35 and 36, it may be unfair and/or just for the Tribunal to refuse the adjournment application for the Appellant to secure a report which would have dealt with causation. The credibility findings by applying an incorrect standard of proof. This ground is arguable. Not departing from country guidance. This is not arguable as there

is no error in the approach to considering whether to depart from country guidance. Ground one only is arguable. There is an arguable material error of law.”

6. Thus the appeal came before the Upper Tribunal. Mr Khan of Counsel, appeared before the Upper Tribunal and relied upon the grounds as drafted and I was also able to hear submissions from Ms Ahmed, Senior Presenting Officer on behalf of the Respondent. After hearing their respective submissions, I informed the advocates that I had reached a conclusion that the decision of the First-tier Tribunal disclosed the making of an error on a point of law. I outlined the parties my reasons in summary for reaching that decision. I now set out for the avoidance of doubt why I had reached that conclusion on the evidence before me.
7. The thrust of the grounds relates to a point of procedural unfairness and the decision made to refuse the adjournment request made on behalf of the Appellant. In this context, Mr Khan set out the chronological history of the claim which began with his claim for asylum being made on 15 July 2017. Following that, a screening interview was concluded on 8 August and a Rule 35 report was compiled on 15 August 2017. That report set out the account given by the Appellant to the medical examiner. In particular, it gave details as to how he was detained in custody for 25 days, how he was with physically beaten, bound with ropes and being burned with hot plastic. At section 5 of the report the medical examiner provided details of his objective clinical observations and findings. In this case the medical examiner made reference to laceration scars on his feet and right elbow area and right upper back and both hands and ankles and feet. The assessment set out in the report was that “he still has back pain in the pain. He has difficulty standing more than an hour. On examination he has scars which may be due to the attack described.”
8. Following that report the Respondent considered the decision to detain the Appellant and review was undertaken. It was noted that the treatment did meet the above definition of torture.
9. Following the asylum interview the Respondent served the decision letter of 14 September 2017. As set out above, the Respondent rejected the factual basis of his claim to have been of any interest to the Taliban and refused his protection claim.
10. The Appellant was released on 11 October 2017.
11. As a result of the factual basis of his claim to have been the subject of detention and ill- treatment his legal representatives sought an adjournment of his hearing so that they could obtain a medico-legal report. In an application set out in writing in a letter dated 21 October 2017, his legal representatives made reference to the Rule 35 report in the following way: “we recognise that Rule 35 report is of limited evidential value as it does not follow the Istanbul Protocol and does not make an assessment as to the cause of his injuries. The Respondent does not accept the problems of the Appellant claims to have had in Afghanistan furthermore the Respondent states section 8 issues damage the Appellant’s general credibility. Therefore we submit that objective medical evidence is required for a fair assessment of the discrete issue of the beating

the Appellant claims to have suffered for acting against Taliban members which directly impact his risk on return.”

12. The application was refused on 24 October 2017 on the basis that “the Rule 35 report is sufficient for present purposes.”
13. The appeal came before the First-tier Tribunal two days later on 26 October 2017. Counsel who attended on behalf of the Appellant renewed that application before the FTTJ. This is recorded at paragraphs 14 – 16 of the determination. It records that the application was considered but refused on 24 October 2017. At paragraph 16 the judge made reference to the renewed application before the Tribunal and the judge stated that it was apparent that no new considerations were put forward and that he agreed with the reasoning of the earlier decision to refuse the adjournment and that the appeal could be considered fairly and justly on the basis of the evidence presented by both parties and because the Appellant had the benefit of legal representation.
14. The judge then went on to consider the factual basis of his claim and the evidence that was provided. As regards the account of detention and treatment, the judge considered the evidence in support at paragraphs 35 and 36. The judge made reference to the Rule 35 report and found that the account given to the doctor was consistent in the main with what the Appellant said to the Respondent. He described the report as “necessarily brief” and made reference to the laceration scars found on the Appellant’s feet, right elbow area, writable back on both hands and ankles. He observed that there was some contrast from the Appellant’s description of the assault on his left shoulder and set out the summary section 6 which included the statement that “he has scars which may be due to the attack described.” However the judge then went on to critically analyse the Rule 35 report by stating that “what the doctor does not attempt to do is to prescribe a cause to any of the injuries, for instance, from beating with a gun butt or a stick or involving melted plastic. As he says, however, at the beginning of this report, it is a factual one rather than a medico-legal one and the Appellant “must not be criticised for this.” At paragraph 36 he then went on to observe rightly that the report should be seen “within the context it was written”. He accepted that a number of staff lacerations were there as recorded by the doctor but went on to state “there are many possible reasons why he accumulated the injuries noted.”
15. At paragraph 42 he summarised his omnibus findings of fact in which he rejected the Appellant’s account and that it followed that he was not ill-treated at the hands of the Taliban and could return to his family in Afghanistan.
16. Mr Khan relied on the written grounds in which it was asserted that in refusing to grant an adjournment the judge erred in law by going on to make adverse findings on the Rule 35 report. In essence what is submitted is that it was unjust and unfair to refuse the adjournment request to enable a medicolegal report to be obtained when the judge then went on to make adverse findings based on the contents of the Rule 35 report when its limitations had been set out in the adjournment request.

17. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding objective is deal with cases fairly and justly. This is defined as including "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues".
18. Ms Ahmed provided a copy of the decision of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). In that case it was held 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?
19. I also have in mind, of course, what was said by the Court of Appeal in the judgment of Moses LJ in the well-known case of SH (Afghanistan) [2011] EWCA Civ 1284 :

"The principle applicable to the request for an adjournment to adduce evidence on behalf of the Appellant was not in dispute. It is fundamental that the parties should be allowed to answer adverse material by evidence as well as argument (see, e.g., In Re. D [1996] AC 593 at 603) and all the more so where the subject matter, such as a claim for asylum, demands the highest standards of fairness." (see paragraph 8).
20. Whilst the judge made reference to the Procedure Rules at paragraph 16, the judge failed to take into account why the report was necessary. As set out in the original application made for an adjournment, the limitations of the Rule 35 report were set out in some detail. It was accepted on behalf of the Appellant that the Rule 35 report was of limited evidential value as it did not follow the Istanbul Protocol and did not make an assessment as to the causation of his injuries. Against that background, it could not be said that the Rule 35 report was sufficient for present purposes which was the decision reached at paragraphs 15 and 16.

21. Furthermore notwithstanding the basis of the adjournment application and the reference made to the evidential limitations of the Rule 35 report, the judge then went on to make adverse findings on the Rule 35 report. The judge in fact did highlight the limitations of the report at paragraph 35 as “necessarily brief” and that it is a factual report rather than a “medico-legal one”. At paragraph 36 he observed that “there are many possible reasons why he has accumulated the injuries noted.” The purpose of the report was to provide a further assessment of the injuries noted to the Appellant in the Rule 35 report which would properly assess issues such as causation which the judge had highlighted was missing from the Rule 35 report.
22. Ms Ahmed in her submissions stated that the Appellant had time to prepare his case before the hearing having claimed asylum on 15 July 2017. However whilst he claimed asylum in July the Appellant was detained and after the service of the Rule 35 report and the decision letter, his instructing solicitors properly sought an adjournment for the purposes of a medicolegal report in support of his factual account. His legal representatives had provided details of experts and a timetable. Consequently I do not accept that this was a case of unreasonable delay on the part of the Appellant or his legal representatives following the claim made for asylum.
23. Having considered the grounds and in the context of the decision of Nwaigwe as set out above, I am satisfied that it has been established that there was procedural unfairness and that as a result the Appellant was not able to provide further evidence that would have been relevant to the factual basis of his claim and relevant to the issues of credibility and the consequent risk assessment.
24. For those reasons I therefore find that it is been demonstrated that there was a material error of law in the judge’s decision. Both parties were in agreement that the correct course to adopt was to remit the appeal to the First-tier Tribunal who would have the opportunity to consider any expert medical report and to make an assessment of the evidence as a whole and findings of fact. Such findings would then form the basis of any assessment of risk on return and by reference to the most recent CG decision of AS (safety in Kabul) CG [2018] UKUT 118.
25. In terms of directions, the Appellant’s representatives shall provide an expert report as they have requested. They will inform the First-tier Tribunal in writing within 21 days of this decision as to the date the report will be available to enable the FTT to list this appeal for a substantive hearing. If any further directions are sought, the Appellant solicitors should make a written application setting out the terms of any such directions.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the appeal is allowed; the decision of the First-tier Tribunal shall be set aside and remitted to the First-tier Tribunal for a further hearing.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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SM Reeds

Signed

Date: 11th June 2018

Upper Tribunal Judge Reeds