Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10350/2018

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 11 January 2019	**On 5 February 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE SMITH

Between

L M
[Anonymity direction made]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Duncan Lewis solicitors

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties.

Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Housego promulgated on 20 September 2018 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 9 August 2018 refusing his protection claim.

2. The Appellant is a national of Bangladesh. He came to the UK on 18 September 2006 with a work permit valid to 6 September 2007. It is part of the Appellant's protection claim that, during that period, he returned to Bangladesh and came back to the UK. It is during the visit to Bangladesh that he says that events on which he now relies occurred. After 6 September 2007, he overstayed in the UK. He was encountered by immigration officers in January 2011 and served with notice as an overstayer. Thereafter he absconded until he was discovered during a further enforcement visit in August 2012, released on reporting restrictions and a travel document was agreed for his removal. He again absconded. The Appellant then came to the attention of the immigration authorities when he was arrested by the police in May 2018. He claimed asylum on 7 June 2018.

3. The basis of the Appellant's protection claim is that he has borrowed money from [AA] who has threatened him and his children if he cannot re-pay the loan. The Appellant's wife and children remain in Bangladesh. He says that his family has continued to receive threats. The Appellant originally said that he could not remember when he borrowed the money but says it was before he came to the UK. However, in a later statement, he said for the first time that he had returned to Bangladesh in 2007 and had made one payment to try to resolve the situation but, far from achieving that aim, he says he was attacked and hospitalised. He relies on scarring caused he says by that incident. He also claims to be suffering from post-traumatic stress disorder ("PTSD") as a result of his experiences.

4. The Respondent disputes the credibility of the Appellant's claim. The Judge did not accept the claim as true, relying on inconsistencies in the Appellant's account and the delay in the making of the protection claim. He accepted that the Appellant has debts and creditors. However, he did not accept that the Appellant had been threatened or attacked by money lenders. He accepted that the Appellant bears scars but did not accept that those were caused as claimed. He concluded that the Appellant is an economic migrant. He also made the point that, as the threat is said to come from non-State agents, there is a complete answer to the claim

(even if true) as there is a sufficiency of protection in Bangladesh and the Appellant can internally relocate.

5. The grounds of appeal focus on a refusal by the Judge to adjourn the hearing. The basis of the adjournment request and consideration of it is set out at [34] to [45] of the Decision. In brief summary, the adjournment was sought to adduce further evidence. We deal with the substance of the Judge's consideration below. The Appellant's two grounds focus on that refusal and assert, first, that the refusal to adjourn deprived the Appellant of a fair hearing and, second, that the refusal was otherwise irrational.

6. Permission to appeal was initially refused by the First-tier Tribunal Judge Bird. The Appellant renewed the application to this Tribunal. He also made an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce the evidence which formed the basis of his application to adjourn.

7. Permission to appeal was granted by Upper Tribunal Judge Canavan in the following terms so far as relevant:

> "… 2. Given that the appellant's representatives were able to identify a number of pieces of evidence that they intended to obtain, and confirmed that they had funding in place for a medico-legal report, it is at least arguable that the judge may have failed to provide the appellant a fair opportunity to produce evidence that might have been relevant to a proper determination of the appeal. I have some doubts as to whether the further evidence the appellant has produced since the hearing would have made any material difference to the outcome of the appeal. Even if his account of the assault is taken at its highest, the judge made clear findings relating to the availability of state protection and internal relocation. However, it is at least arguable that the further evidence that the appellant's representatives wanted to obtain might have been relevant to his overall credibility, including his claim that the money-lender was a person of some influence. It may have been relevant to the assessment of the appellant's vulnerability and the issue of internal relocation. The grounds have sufficient merit to justify more detailed consideration at a hearing."

8. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

The Basis of the Adjournment Request and Further Evidence

9 The basis of the application to adjourn is made in written submissions dated 17 September 2018. By that time, an adjournment had already been refused on the papers twice. The adjournment was to permit the solicitors to obtain corroborative evidence of the Appellant's account from Bangladesh and to obtain a medico-legal report in respect of the Appellant's reported scarring and mental health. There was at that time a rule 35 report dealing with the scarring but nothing further.

10. The submissions point to the following relevant matters. First, the solicitors had been unable to obtain the Appellant's medical records and corroborative evidence due to the restricted time available. As Ms Fisher pointed out and is made clear in a subsequent statement from the Appellant's solicitor dated 5 October 2018 which accompanied the application for permission to appeal, Duncan Lewis was instructed only on 4 September 2018 (although the Respondent's refusal is dated nearly one month earlier). Second, there were significant credibility issues raised by the Respondent in his decision and it was said that the further evidence may assist the Appellant, particularly the evidence in the form of a medico-legal report. The adjournment sought was a period of four weeks from the date of the submissions and hearing, therefore by mid-October.

11. The corroborative evidence on which reliance is placed is as follows:

    (a) An affidavit from the Appellant's wife dated 4 October 2018 which attests to the taking of the loan, the Appellant's visit to Bangladesh when he tried to repay one instalment of the loan and the attack on the Appellant and his hospitalisation;

    (b) A certified letter from an unidentified person on notepaper headed "Bangladesh Awami League" dated 4 October 2018 which states that [AA] is known to the person and organisation as the Joint Secretary of the Sylhet branch of the Awami League and that he is a local influential leader who also provides credit with interest;

    (c) The Appellant's expired passport bearing stamps appearing to show that he left Bangladesh and arrived in the UK on 18 September 2006 but also that he went to Bangladesh on 27 May 2007 and left on 26 July 2007;

    (d) A declaration from the Appellant's brother in law that he sent the documents to the UK at the request of the Appellant's wife;

    (e) A hospital certificate setting out an examination on 12 June 2007 and appearing to provide details of scarring found as well as a discharge letter dated 19 June 2007 appearing to confirm that the Appellant was hospitalised from 12 to 19 June 2007 as the result of a physical assault.

12. The Appellant also seeks to rely on the report of a Consultant Forensic Psychiatrist, Dr S Sahota dated 18 October 2018. In brief summary, Dr Sahota makes the following comment:

    (a) The Appellant suffers from PTSD and has suffered from symptoms of PTSD for over ten years (4.1.4]). He says that "[h]is symptoms are characteristic of this condition although his presentation is atypical as he has not received professional input to date. My impression is that the severity of symptoms are not subclinical since onset of trauma and the reason he has not sought treatment is largely due to cultural reasons, poor insight and low

health seeking behaviour." He refers to the cause of PTSD as being a violent attack based on the Appellant's reporting and says that he is "concerned about the impact of returning to an environment where trauma has taken place in a person with PTSD and vulnerability to stress. I foresee a deterioration in [LM]'s mental health in these circumstances".

(b) The Appellant has received medication for anxiety disorder. He stopped taking that medication after a few days. Dr Sahota wished to investigate for physical causes of the anxiety "given the chronic nature of these symptoms". Dr Sahota also recommends specialist PTSD treatment and a change in medication.

(c) In terms of the impact of the Appellant's mental health on his fitness for interview, Dr Sahota says that "[h]is attention, concentration and memory are within the normal range and not substantially impacted by his traumatic symptoms."

(d) Dr Sahota concludes that the Appellant's scarring is "consistent" with the Appellant's account and "highly consistent" with traumatic attack.

The Decision in Relation to the Adjournment Request

13. As we have already noted, the Judge deals with the adjournment request in some detail at [34] to [45] of the Decision. He does so in the following manner. First, he notes the basis of the request as being the desire to obtain further documents and a medico-legal report (following the rule 35 report which identified the possible need for that report), that those have not been obtained earlier due to the timeframe between the Respondent's decision, the instructing of the current solicitors and the hearing date, the timescale within which those documents could be obtained (a period of four weeks) and funding being available for the purpose of instructing an expert. The Judge then directs himself as to the relevant test and potential prejudice to the Appellant if the adjournment request is refused.

14. The Judge then goes on to consider those matters. He accepts that there is a credibility concern in this case and identifies a central inconsistency being the Appellant's failure to mention the visit to Bangladesh in 2007 at the asylum interview.

15. The Respondent objected to the adjournment request. He pointed to it being unlikely that the hospital would have records dating back ten years and that it was also unlikely that the Appellant's wife would have the passport which expired in 2009, particularly since there is no reason why the Appellant's wife would be holding that document in Bangladesh if, as appears to be the Appellant's case, he left Bangladesh in 2007 and has not been back since. He would have needed that passport to return to the UK. It was noted that the Appellant had not mentioned any mental

health issues nor the attack until the rule 35 report in August 2018. The Judge queried whether the Appellant had received any treatment for mental health during his time in the UK and it was confirmed that he had not. It was also confirmed that he has direct telephone contact with his wife.

16. The Judge went on to refuse the adjournment request for the following reasons:

> "39. I declined to adjourn the hearing. The Rule 35 report identified some scarring. A medico-legal report was highly likely to say that the scarring was consistent with the account of being attacked, and undoubtedly the Home Office would say could that it could have been caused [sic] in any number of ways. I did not consider that such a medico-legal report would assist in coming to a conclusion for that reason. It was somewhat unlikely that the hospital still have records 10 years later, and there is no reason why e mail or telephonic enquiry could not have been made even in the short time since the current solicitors were instructed. It was said only that the wife *"may have"* a copy of the passport, and although she could be telephoned no enquiry had been made of her. This was speculation.
>
> 40. It followed that I would not be applying TK (Burundi) v SSHD [2009] EWCA Civ 40 as damaging to credibility.
>
> 41. Without deciding that he was a vulnerable witness I decided that the appellant would be treated as a vulnerable adult in the way recommended by the Joint Presidential Guidance Note Number 2 of 2010. The Home Office Presenting Officer did not object. I followed the Guidance in the hearing, and Counsel for the appellant so confirmed upon my enquiry of her. The issue in the case was credibility of the account, and if the account was found reasonably likely to be true whether there was sufficiency of protection or whether internal relocation was viable. The latter 2 points are heavily dependent on objective evidence and submission rather than the evidence of the appellant.
>
> 42. I have found that the appellant has debts in Bangladesh so that the reports from elders would not be of further assistance to him."

17. Having observed that the guidance in relation to vulnerable witnesses was followed by the Respondent and that Counsel was content that this had been done, the Judge indicated that he was considering the Appellant's evidence as if he were vulnerable which would alleviate any disadvantage to him. Finally, he said that, "if, in the consideration of the evidence subsequent to the hearing, [he] considered that it was not possible fairly to come to a conclusion, [he] would relist the case as part heard." He indicated also that it would be expected that the Appellant's solicitors would take steps to obtain the further evidence immediately and if a permission to appeal application were made that should be accompanied by any further evidence. He concluded that he could fairly determine the appeal based on the hearing he conducted.

The Appellant's Grounds and Submissions of the Parties

18. The grounds draw attention to the need to enquire whether the hearing was fair and not simply whether the Judge's refusal to adjourn was unreasonable. Our attention is drawn to the decision in Nwaigwe (adjournment: fairness) [2014] UKUT 00418. We do not need to cite from that case. We have taken into account when reaching our decision, the test as set out in the headnote.

19. The unfairness of the hearing is summarised in the grounds in the following way:

    (a) The evidence sought and since obtained addresses many of the credibility findings reached by the Judge;

    (b) The Appellant's credibility was the subject of significant adverse comment in the Respondent's refusal and was therefore "a pivotal issue";

    (c) The Judge did not take account of the fact that the medico-legal report was to deal with both scarring and mental health issues (he refers only to the likely weight of any conclusions as to scarring);

    (d) Although the Judge said that he had treated the Appellant as if he were a vulnerable witness, what that entails is beyond the expertise of the Tribunal.

    In conclusion, the grounds assert that the Appellant was significantly prejudiced by the refusal of the adjournment and was deprived of a fair hearing as a result.

20. By reference to the further evidence, the Appellant also argues that the Decision is irrational. He points to the evidence based on the Appellant's wife's affidavit, the hospital letters and the passport as corroborating the Appellant's case that he travelled to Bangladesh in 2007 and was attacked there. It is further argued that the medico-legal report would provide more detail than the rule 35 report. That goes to the Judge's finding that the Appellant was not attacked in 2007 as he claimed.

21. The second point made is that the Appellant's wife's affidavit supports his case that his family have moved home to avoid the threats made by [AA] and the continued risk to him from that source. The Judge rejected that account based on inconsistencies about where the Appellant's family were living (although we are not clear how this further evidence assists the Appellant's case since the letter from the Awami League suggests that [AA] is the branch secretary of the Awami League in Sylhet which is where the Appellant's wife says she is living).

22. Finally, the initial grounds (which pre-date the medico-legal report) suggest that the medico-legal evidence may undermine the Judge's finding that his mental illness has not impaired his recall and that this evidence will deal with whether the Appellant is feigning his illness. Whilst we accept that Dr Sahota's report does provide a diagnosis of

PTSD based on the Appellant's reported symptoms, the doctor does not suggest that the illness has affected his ability to recall; indeed, quite the opposite as we observe at [12] above.

23. The grounds go on to deal with what is said at [88] of the Decision that the appeal would fail even if the Appellant's account were true based on the availability and sufficiency of protection and the possibility of internal relocation. The Appellant argues that, if he were found to be generally credible, this may affect the weight to be given to other evidence and his adverse immigration history, that a Judge might accept the Appellant's account that [AA] is powerful in the local area (even though he failed to mention that in his statement) and that the Appellant's mental health is relevant to whether he could internally relocate.

24. Ms Fisher adopted those grounds in her submissions and emphasised the following points:

    (a) The Appellant's case was within the Detained Asylum Casework and therefore neither he nor his solicitors had time to obtain a medico-legal report by the time of the hearing.

    (b) The corroborative evidence goes directly to the findings made by the Judge in relation to the claimed threat made by the money lender. That evidence tended to show that the Appellant was in Bangladesh in 2007 and was attacked there and that [AA] is a powerful man in the local area.

    (c) Although, as we pointed out, the report of Dr Sahota does not say that the Appellant's power of recall is affected by his mental health and says little about scarring (as the Judge concluded was likely to be the case), Ms Fisher pointed out that the medical report supports the Appellant's case to suffer from PTSD due to a traumatic event which, considered with the other evidence, might lead a Judge to a different conclusion. Moreover, the report deals with the impact on the Appellant's mental health of return to Bangladesh (if his account is accepted as true) and that, in any event, he would face isolation and exclusion which would impact on the possibility of internal relocation.

25. In response, Mr Deller accepted that the issue is whether the refusal to adjourn is unfair and not whether it is reasonable. He pointed out, though, that the Judge was very careful to explain the reasons for the refusal in the context of the case as a whole in terms of credibility. He also pointed out that the Judge found that the appeal fails whether the Appellant's claim is credible or not because of the sufficiency of protection and possibility of internal relocation. The evidence which goes only to the credibility of the claim does not impact on the Judge's findings in relation to those aspects. The only slight caveat, as Mr Deller accepted, is in relation to the power and reach of [AA]. However, the evidence before the Judge and since is only that [AA] is a member of the party in power. There is nothing further in relation to his reach.

26. Mr Deller argued that this is not a case where it can be said that the further evidence establishes any matter as a fact (as to which see the case of E v Secretary of State for the Home Department [2004] EWCA Civ 49). The most which can be said is that the evidence "may" have made a difference. The further evidence does not undermine the Judge's findings that, even if the claim were true, the appeal fails due to the sufficiency of protection and internal relocation. Further and in any event, the claim is based on facts said to have occurred in 2007. The passage of time since coupled with the Appellant's failure to claim asylum at an earlier stage means that credibility is already damaged.

27. Although Mr Deller accepted that the solicitors may only have had a short period in which to prepare the appeal, the Appellant's case is that he has known of his claim for over ten years.

28. In conclusion, Mr Deller submitted that the further evidence does not make much difference. The rule 35 report was considered. The Appellant's vulnerability was taken into account in accordance with the Practice Statement. Overall, the Judge was well aware of the need for fairness particularly where the timescales were short but in circumstances in which the further evidence was unlikely to make any practical difference, he submitted that there is no error of law.

29. In reply, Ms Fisher pointed out that justice must not only be done but be seen to be done. She submitted that the application to adjourn was a cogent one based on evidence which the solicitors intended to adduce which they have subsequently obtained. It was unreasonable not to adjourn and also unfair. The Judge could have adjourned the hearing part-heard as he indicated he might do. The further evidence undermined some aspects of the Judge's reasoning as to the adjournment. For example, the Judge surmised that hospital records might not be available after ten years, but the Appellant was able to obtain those. The evidence is capable of supporting the Appellant's claim to have returned to Bangladesh and being assaulted there which in turn may displace the findings in relation to sufficiency of protection and internal relocation. Whilst the Appellant's delay in claiming asylum may be a relevant factor, a Judge still has to consider risk on return based on an assessment of the evidence looked at holistically.

30. Although Ms Fisher accepted that the medical report might not itself undermine the Judge's credibility findings based on the Appellant's powers of recall, the doctor's conclusions were nonetheless relevant to the possibility of internal relocation. She did not suggest that there are no credibility issues and accepted that the Appellant has a poor immigration history but submitted that he does now have evidence capable of supporting the core of his claim (even though she accepted that the core of his claim now asserted in relation to what occurred in Bangladesh in 2007 was not mentioned in his asylum interview).

31. We reserved our decision. Both parties agreed that if we were to find an error of law, as this is a challenge on procedural grounds based on asserted unfairness of the previous hearing, the appeal should be remitted for hearing de novo. We turn to consider our decision whether the Judge's refusal to adjourn was unfair and/or unreasonable.

Discussion and Conclusions

32. We have reached the conclusion that the Judge did err by failing to grant an adjournment in this case for essentially two reasons.

33. First, although the Judge notes at [34] of the Decision that the reason behind the need for an adjournment is the limited timeframe available to the Appellant's solicitor (as a Detained Asylum Casework case), the Judge has not factored that into account when considering whether fairness demanded that he adjourn.

34. Second, and allied to that reason, the Judge has not taken into account that the adjournment sought was a short one of only a matter of weeks, an expert had already been identified to provide that report and funding was available for that report. That is a relevant factor when considering whether the interests of justice required an adjournment, but the Judge did not consider it.

35. The focus of the Judge's reasoning is that the further documents and report which the Appellant wished to adduce could make no difference. We have some sympathy with that view so far as the additional evidence from Bangladesh is concerned. Whilst that may be capable of supporting a claim that the Appellant was attacked in Bangladesh in 2007 and the passport was capable of supporting his case that he had returned there in 2007, those documents do not add to the reasons for any attack nor explain the inconsistency in his evidence. There is also no explanation why the Appellant's wife was holding his passport when he would have required it to return to the UK nor why the Appellant himself could not have obtained the documents earlier, particularly since, on his case, he had known of the basis of his claim for over ten years by the time he made it.

36. The affidavit of the Appellant's wife is capable of supporting the Appellant's case that he was attacked because he was in debt to a money-lender and was indeed attacked when in Bangladesh in 2007 but raises further questions about how it is that the Appellant's wife has managed to remain in Bangladesh for the past eleven years or so without an attack on the family. In any event, that is a document which the Appellant could have obtained for himself. There is also no reason why that document at least could not have been obtained by the solicitors in the time since instruction.

37. We accept though that the medical report which the Appellant wished to adduce falls into a different category. The Appellant is unlikely to have

realised that an expert report might avail him and even though, for the reasons we give above, it may not assist him, certainly in relation to the reasons for any inconsistency in his claim, nonetheless, the importance of such a report may well have not become evident until after the rule 35 report was written and once the solicitors were instructed.

38. We have considered carefully whether the error can be said to be immaterial, particularly in light of the comments of Judge Canavan when she granted permission. We have reached the view that the error is material for four reasons.

39. First, as Ms Fisher pointed out, the basis of the finding at [88] of the Decision as to sufficiency of protection is not expanded upon by reference to the evidence other than a broad assertion that "[t]he copious objective evidence in the refusal letter is sufficient to show that there is sufficiency of protection." The finding is insufficiently reasoned.

40. Second, as Ms Fisher also pointed out, the finding in relation to internal relocation takes no account of the Appellant's case that [AA] is powerful in Bangladesh and would find the Appellant if he returned. That is not a particularly strong reason given that, as we note above, there is very limited evidence in support of that assertion, an inconsistency in the Appellant's evidence in this regard and potential question marks raised by the further evidence.

41. Third, however, also in relation to internal relocation, the issue whether it would be unduly harsh for the Appellant to relocate within Bangladesh would need to take into account the medical evidence about his mental health condition. We note that Ms Fisher's point about the isolating effect of relocation within Bangladesh does not apparently factor in the consideration that the Appellant's wife lives in Bangladesh and the Appellant has apparently managed to live in and adapt to a strange country when he came to the UK with limited if any family support here. Nonetheless, the Appellant's mental health condition would be a relevant factor to assess.

42. Finally, the error which we have found to exist is based on a lack of procedural fairness. It would be inappropriate in those circumstances to compound the unfairness by refusing to set aside the Decision and permit a re-hearing of the appeal.

43. For that reason also, we agree with the submissions of the representatives that, if we were to find an error of law and to set aside the Decision as we have done, then the appropriate course is to remit the appeal to the First-tier Tribunal bearing in mind in particular the need for fresh credibility findings to be made on the evidence as is now available.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Housego promulgated on 20 September 2018 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed  Dated: 30 January 2019

Upper Tribunal Judge Smith