



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

Appeal Number: PA/07128/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 8 January 2020**

**Decision & Reasons Promulgated
On 27 January 2020**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mr S S
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons.

I make this order because the appellant has made a protection claim.

Representation:

For the appellant: No appearance.

For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of India born on 16 September 1982, appeals, with permission granted by the Upper Tribunal ("UT"), against a decision of Judge of the First-tier Tribunal Kainth (hereafter the "judge") who, in a determination promulgated 12 September 2019 following a hearing on 28 August 2019, dismissed his appeal on asylum grounds, humanitarian protection grounds and human rights grounds.
2. The appellant had claimed asylum because he said he was at risk of persecution in India for the following reasons: (i) he or his father owed money to people which had not been repaid; and (ii) he had been involved with the Khalistan Movement in India. At the hearing before the judge, he confirmed that he did not wish to pursue the claim based on his or his father's unpaid debt obligations.
3. The sole issue in this appeal is whether the failure of the judge to adjourn the hearing of the appellant's appeal in order to allow him to obtain representation has resulted in the appellant having been deprived of a fair hearing.
4. Permission to appeal was refused by the First-tier Tribunal ("FtT"). An Upper Tribunal Judge ("UTJ") granted permission to appeal. The UTJ said that it was arguable that *"there was a lack of procedural fairness in the manner the appellant's application for an adjournment was decided by the judge"*.
5. On the day when this appeal was listed for hearing before me, there was no appearance by or on behalf of the appellant. The clerk telephoned FR solicitors, the appellant's representatives. They sent an email to the UT which was received on the same day at 12:51 hours in which they said that they had no knowledge of the hearing on 8 January 2020. They confirmed that they had not received a Notice of Hearing and that they only became aware of the hearing upon receiving a telephone call from the UT asking whether someone would attend the hearing. They requested that the hearing be adjourned so that they could take further instructions from the appellant.
6. I considered whether to exercise my discretion to adjourn the hearing. I took into account the fact that the Notice of Hearing dated 3 December 2019 (Form IA113) had been sent to the appellant at the address held on file for him in addition to being sent to FR Solicitors. I was satisfied that this address was the correct address for him, as last notified to the Tribunal. I was satisfied that he had been properly served with the Notice of Hearing and that it had not been proven that the Notices of hearing addressed to the appellant and to his representatives had *both* been lost in the post.
7. It was most unlikely that both Notices of hearing were lost in the post or had somehow gone astray. Even if the appellant's representatives had not received the Notice of Hearing, there was no explanation for the appellant's absence. It is evident from the procedural history (described at para 10 below) and the non-appearance at the hearing before me that this appellant has a track record for requesting his hearings to be adjourned. To date, he has made three requests for his hearings to be made, two requests during the course of the proceedings in the FtT and the third being the request to adjourn the hearing before me.

8. Having considered all of the circumstances, the overriding objective and the needed for fairness (which is not limited to fairness to the appellant but also includes fairness to the respondent), I refused to adjourn the hearing. I decided to exercise my discretion to proceed with the hearing in the absence of the appellant and any representation on his behalf.
9. I heard briefly from Mr Lindsay.
10. The Tribunal's file shows that:
 - i) On 30 July 2019, a Notice was sent to the appellant and Morden Solicitors LLP, his then representatives, that the pre-hearing review would take place on 21 August 2019 and the full hearing on 28 August 2019. The appellant was in detention at that time. On 2 August 2019, the appellant was bailed to an address in Newcastle.
 - ii) On 9 August 2019, Morden Solicitors LLP requested the FtT to adjourn the hearing on 28 August 2019 and relist the appeal near the appellant's residence.
 - iii) On 22 August 2019, the application to adjourn the hearing on 28 August 2019 and transfer the appeal was refused by Judge of the First-tier Tribunal L.S. Bulpitt.
 - iv) On 23 August 2019, the FtT received by facsimile a letter dated 23 August 2019 from Morden Solicitors LLP informing the FtT that the appellant had withdrawn his instructions.
11. It is clear from the above that the appellant chose to withdraw his instructions from Morden Solicitors LLP knowing that the adjournment request for the hearing on 28 August 2019 had been refused. He withdrew his instructions in the knowledge that his hearing was expected to proceed on 28 August 2019.
12. The judge's Record of Proceedings ("RoP") shows that the appellant initially stated that he wished to proceed with the hearing, that he did not require legal representation and that there would no witnesses other than himself. However, he subsequently changed his mind and said that he wanted an adjournment and that he was trying to arrange finances via friends to obtain legal representation.
13. At paras 27-33, the judge set out some of the procedural history explained above and gave his reasons for refusing to adjourn the hearing. Paras 27-33 read:
 - "27. On the Tribunal file was a letter from Morden Solicitors LLP dated 23rd August 2019. It read:-

"We write to inform you that the above-named client has withdrawn his instruction and we are no longer acting for him. Please note that we will not be assisting him at this hearing which is scheduled for 28th March 2019. Please update your record and further correspondence should be made directly to client. Should you have any queries regarding this matter please don't hesitate to contact our office."
 28. That letter was sent following an application by the solicitors under cover of 9th August for a change of venue. Duty Judge Bulpitt on 22nd August 2019 refused the application stating: -

"... The appellant's application to adjourn the hearing on 28th August 2019 and transfer the hearing of the appeal is refused. It is noted that the appellant is now on bail and living in Newcastle. The Tribunal

Procedure Rules identify that dealing with cases fairly and justly includes avoiding delay, so far as compatible with proper consideration of the issues. It is now more than four months since the appellant claimed asylum and an adjournment and transfer of the hearing will result in a significant further delay. In all the circumstances it is in the interest of dealing with the case fairly and justly that the appeal proceed on the date fixed ..."

29. Initially, the appellant confirmed that he was ready to proceed with the appeal, did not require legal representation and had no documentation upon which he sought to rely upon.
 30. A few minutes into the hearing, the appellant changed his mind and requested an adjournment. He confirmed that he was not relying or calling any witnesses. The reason for an adjournment was in order to secure legal representation. He did not have the requisite financial means to instruct lawyers currently but would ask friends to provide financial assistance in order that he could secure legal representation.
 31. The application to adjourn was opposed by Mr Grennan who represented the respondent.
 32. I gave careful consideration to the application. There is no guarantee that the appellant now on bail would be able to secure sufficient funds to instruct legal representatives. The appellant confirmed that he was not relying upon any further documentation. He did not propose to call any witnesses. He stated that the account he provided during the course of his screening and asylum interviews was correct. He further confirmed that the only issue for consideration was with respect to his impugned political affiliation and not as previously stated by him during the course of his asylum interview, that he is wanted by a moneylender in India on the basis that his father took a loan out which had not been paid because of his untimely death and the loan has now transferred to the appellant.
 33. The application to adjourn was refused."
14. In summarising the oral evidence at the hearing, the judge said, at para 56:
- "56. The appellant was asked a number of questions by both myself and Mr Grennan with respect to his involvement with the Movement and the basis of his claim. The appellant was hesitant in answering questions. He repeated on more than one occasion "I need to speak to my lawyer to get advice and pay him." The appellant was invited to explain in as much detail as possible why he was unable to return to India. The account he gave during the course of his oral evidence was inconsistent with what he said during the course of his asylum interview."
15. The judge proceeded to consider the appellant's account of his alleged fear of persecution on account of his alleged involvement with the Khalistan Movement, taking into account, in summary, the following:
- i) the change in the basis of his asylum claim, from his alleged fear on account of the financial debt in his first screening interview in 2009 to "*He claims to belong to a certain political party ... The parties had a dispute over land his father was murdered...*" in his most recent screening interview (paras 52-53 of the judge's decision);

ii) that, during the course of his interview on 8 May 2019, the appellant distanced himself from the reference to the land dispute because at question 259 he said that there was no such land dispute (para 54 of the judge's decision);

iii) that the account he gave in oral evidence was inconsistent with his answers at his asylum interview, as the judge explained at paras 57-66 which read:

"57. During his asylum interview (AIV 52) he stated that his problems in India commenced in 1997 however, later on in the interview he stated that his problems commenced in 2006 (AIV 161).

58. The appellant joined the Movement (called Akalidhal) in 2005. This is some years after he claimed that his troubles commenced in 1997 and in the alternative one year after in 2006. There is an internal inconsistency with respect to when the claimed difficulties arose.

59. The appellant claimed that he had been arrested on three separate occasions the first arrest in June 2006 (AIV 74). However, to question 166 he stated his first was arrest in 1995/1996.

60. The appellant during his oral evidence said that his first arrest was in around June 2006, his second arrest two/three months later and he was last arrested in June 2007. That he was admitted to more than one hospital as consequence of being assaulted viciously by the police. Whilst I acknowledge that the appellant is not required to provide corroborative evidence, it would not have been too difficult for the appellant to have obtained appropriate medical evidence from the hospital in India to confirm that he was admitted and the treatment he received.

61. He claimed that his deceased father was a member of the Movement (AIV 64) but later on in the interview (AIV 127) he said that his father was a prominent leader in the party notwithstanding his earlier response coupled with the fact that his father was uneducated and a farmer.

62. That his father had been arrested on multiple occasions (AIV 126/127) but criminal charges although initiated, were subsequently withdrawn (129). That his father was last arrested when the appellant was age [sic] 10 (AIV 138), which would mean that his late father's last arrest was in or around 1992. This significantly predates the appellant's claimed involvement with the Movement.

63. As stated above, during the course of the appellant's original screening interview in 2009, he made no reference to his involvement with any political party/Khalistan Movement.

64. I do not find it credible that if the appellant's involvement in demonstrations was as prolific as he claims, resulting in three arrests and significant beatings as a consequence by the police, he would be released without charge.

65. Within the body of the Rule 35 report, the Doctor noted that the appellant claimed to have been tortured in India in 2007 due to a property dispute. That his father was killed over property and that the police were involved as well as his uncle who had paid the police off. That he was tortured with a burning rod and was stabbed with a knife. The injuries recorded were multiple burn scars to the right lower leg and scar to the abdomen which required stitches in hospital. That explanation to the Doctor is inconsistent with what the appellant had to state during the course of his asylum

interview when he claimed that he had been assaulted via rod, iron pipes and a leather strip (AIV 98, 114 and 119).

66. An additional inconsistency with respect to the account provided to the Medical Examiner is that during the course of his asylum interview, the appellant claimed that he had been targeted by the police because of his involvement with the Khalistan Movement and because they wanted to build their own temple in Punjab (AIV 37 and 60). The Rule 35 report coupled with a body map and the observation made by the examining physician are not corroborative with respect to the appellant's account. The report is not in line with the Istanbul Protocol and the appellant's injuries as noted by the Medical Examiner could have been inflicted in any number of ways. In line with the case of Mibanga and SA (Somalia) [2006] EWCA Civ 1302, the injuries as noted could have been everyday injuries and are not determinative of the appellant's claim."

The grounds

16. The grounds refer to the Upper Tribunal's decision in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. They further refer to the fact that:
- i) the appellant was unrepresented at the hearing;
 - ii) there was no appellant's bundle and not even a witness statement;
 - iii) Morden Solicitors LLP had come off the records five days before the hearing;
 - iv) there was no exploration by the judge why Morden Solicitors LLP had come off the record;
 - v) the judge failed to consider the issue of fairness, whether the appellant would be deprived of a fair hearing, as there was no mention of this anywhere in his decision; he erred in refusing the adjournment request solely on the basis that the appellant "*would not be able to secure sufficient funds ... was not relying upon any further documentation [and] did not propose to call any witnesses*".
 - vi) the appellant had repeatedly raised the issue of representation on more than one occasion as mentioned by the judge at para 56 of his decision;
 - vii) it was clear that without the benefit of closing argument, let alone an appellant's bundle or witness statement, the appellant could not receive a fair hearing; and
 - viii) the issues in the appeal were "*not especially straightforward*".

Assessment

17. FR Solicitors made the applications to the FtT and the UT for permission. The same grounds were relied upon. They were settled by Counsel. Neither FR Solicitors nor Counsel appeared to be aware that the appellant had withdrawn his instructions from Morden Solicitors LLP five days before the hearing on 28 August 2019 and that he did so in the full knowledge that an adjournment request had already been refused and it was therefore expected that the full hearing would proceed.
18. Far from it being the case, as contended in the grounds, that the judge was obliged to explore the reasons why Morden Solicitors LLP ceased acting just five days before

the hearing, it was for the appellant to explain why, having instructed legal representatives so as to be in the position of being legally represented at his hearing, he chose to withdraw his instructions from Morden Solicitors LLP just five days before the hearing date and leave himself in the position of attending his hearing without representation.

19. As Judge Bulpitt said in refusing the adjournment request of 9 August 2019, four months had elapsed since the appellant made his asylum claim on 12 April 2019. Furthermore, the appellant has been in the United Kingdom since 2 September 2009 when he claimed to have entered illegally. The events that he based his asylum claim upon had occurred before he entered the United Kingdom. Plainly, it was not in his interest nor was it fair for there to be any further delays in the determination of his asylum claim.
20. The grounds say nothing about the judge's assessment of the appellant's substantive case. They fail to engage with the judge's reasoning in any way and explain precisely how legal representation could have assisted in a fair assessment of his asylum claim.
21. It is evident from the judge's reasoning that the appellant was given every opportunity to explain the discrepancies in his evidence. In the absence of any explanation in the grounds, it is impossible to see how legal representation at the hearing could have made a difference.
22. In all of the circumstances, I have concluded that it simply has not been shown that the appellant has been deprived of a fair hearing.
23. I have therefore concluded that the judge's refusal to adjourn the hearing on 28 August 2019 did not deprive the appellant of a fair hearing.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent decision on asylum grounds, humanitarian protection grounds and human rights grounds stands.



Signed
Upper Tribunal Judge Gill

Date: 20 January 2020