IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004237

First-tier Tribunal Nos: PA/51913/2022
IA/07795/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ML
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms S Iqbal, Counsel; instructed by Anne Cuthbert Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 2 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Norris, dated 12th September 2023, dismissing his appeal under the Refugee Convention and on human rights grounds.

2. The Appellant applied for permission to appeal on several bases including that:

   (i) the judge acted unfairly in failing to accede to the Appellant's adjournment request so that two witnesses could attend;

   (ii) the judge treated the previous decision of 12 September 2006 as a legal strait jacket and failed to consider the new evidence alongside the old evidence and treats the failure to adduce the evidence in 2006 as determinative of the appeal;

   (iii) the judge failed to reach clear findings on identity, detention and torture, and the death of the Appellant's wife and his *sur place* activities in the UK: specifically, the judge failed to reach findings on the medical certificate confirming the wife's death from brain injury, chest trauma from assault and torture and discounted the evidence based on the lack of a witness statement from the brother-in-law or a police report whereas there is no requirement for corroboration;

   (iv) the judge gave inadequate consideration to the background country evidence in the bundles;

   (v) the Article 8 assessment is flawed as the age and period of time spent in the UK are not considered nor is the reasonableness of the Appellant relocating, nor the Respondent's delay and cancellation of removal directions, and the judge wrongly finding the Appellant was not financially independent as she found he was receiving NHS treatment despite being an asylum seeker.

3. Permission to appeal was granted by First-tier Tribunal Judge Dainty in the following terms:

   1. The application was made in time.

   2. The grounds aver that the judge made an error in refusing the application for an adjournment, in particular the judge failed to consider whether the appeal could be fairly determined if there were no adjournment. It is further asserted that the judge fails to properly apply the Devaseelan guidelines by treating them as a legal strait jacket. It is further asserted that the judge fails to reach sufficiently clear findings on identity, his account of the torture, the death of his wife and sur place activities. As to the wife's death the judge failed to engage properly with documentary support and makes a mistake in finding that corroboration is required. There is also, it is averred, inadequate consideration of the background country evidence in the bundles. Finally it is said that the article 8 assessment is flawed – the age and period of time spent in the UK are not considered nor is the reasonableness of the Appellant relocating or the Respondent's delay. Finally the judge was wrong to find that the Appellant was not financially independent including in terms of his reliance on the NHS as he is entitled to use the NHS.

> 3. The judge properly engaged with the interests of justice/a fair hearing in relation to the adjournment but found that there had been ample time (time during which representatives had been engaged) to ensure that permission was obtained for the witness to give live evidence from Sweden. The judge carries out a thorough analysis of the discrepancies in the evidence but it is arguable that the reasons given for the findings are ambiguous. Put another way it is arguable that the approach to Devaseelan was wrong in that the judge simply analyses the reliability of the evidence and then rejects it and states that she maintains judge Rintoul's findings even though some of the matters genuinely post date the first judgement such as the alleged death of the wife and the sur place activities. Even if the judge disbelieves the Appellant on these matters she must nevertheless reach clear findings. It is further arguable that there should have been some consideration of objective material provided in the bundle. Finally the article 8 analysis is arguably incorrect in its treatment of "financially independent" and the article 8 reasons are arguably too brief.

4. At the conclusion of the hearing I reserved my decision, which I now give. I do find that the decision demonstrates material errors of law, such that it should be set aside in its entirety in relation to the protection claim.

5. In respect of the first ground concerning the adjournment, at first blush, reading the reasons given for refusing the adjournment application, they are perfectly reasonable. A letter from one witness (Dr Okungu) was dated 28 July 2007 whilst the latter's letter was dated 10 January 2023. Thus, the two proposed witnesses were known to be key to the second appeal and the solicitors (not counsel, as the judge states – given that this is not a direct access matter) should have realised that they would need to adduce this witness evidence and call the witnesses to give evidence sooner. Indeed, the solicitors could have readily given the witnesses' availability prior to listing as there is functionality to do so within the HMCTS online appeal case management following the ASA and Review at the Listing stage. These omissions were plainly not the fault of the Appellant. I further bear in mind that the evidence that the Appellant sought to adduce was from two key witnesses. The first, Dr Okungu, was allegedly detained with the Appellant and could vouch for his identity, detention and torture. The second, Mr Kisekka, is the Secretary General of the FDC-Europe and could testify to the Appellant's *sur place* activities for the FDC as an opposition party. Given that the judge specifically identified in her decision at §5(b) and (c) that the previous judge did not accept that the Appellant had ever been involved in the FDC, or that he had ever been detained or tortured, these two witnesses would be vital to the Appellant being able to establish that a departure from the findings of the previous judge should happen. The question is, not whether the judge acted reasonably in refusing the adjournment application but whether the Appellant could still have 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? See SH (Afghanistan) v. Secretary of State for the Home Department [2011] EWCA Civ 1284 (taken from the headnote for Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC). In the above fact-specific context, I find that the Appellant was deprived of his right to a fair hearing because, although the judge acted perfectly reasonably in observing the lapses in the preparation for the case and the delay in contacting the Taking of Evidence department and the lack of witness statements, the judge was also aware that the witnesses would give

evidence that was material to the previous findings and whether or not that post-decision evidence could then unseat the previous findings pursuant to Devaseelan v. Secretary of State for the Home Department [2002] UKAIT 702. Thus, without the ability to call those witnesses, and notwithstanding that the Judge gave reasons for dismissing the appeal based on their evidence which was untested and they were unable to answer in cross-examination (§§24(d), §§35-38, §§55-61 and §73), the adjournment deprived the Appellant of a fair hearing as he was prevented from presenting the evidence that might arguably have caused a departure from the previous findings outlined at §5(b) and (c) of the decision. This error was material to the assessment as the witnesses testimony may have caused the judge to find otherwise based upon their post-decision evidence. Thus, this error alone infects the entirety of the decision which means it must be set aside.

6. From a practical standpoint and as an aside, given that the previous decision was promulgated on 12 September 2006 and the second appeal was finally taking place on 30 August 2023, after approximately 17 years, it was vital that the Appellant was permitted to present all of his evidence so that the matter could be brought to a final conclusion. Additionally, I gauge the fairness of the hearing with a view to what would likely occur if the Appellant were to present a fresh claim and argue that he was not able to present the testimony of these two witnesses whom a Tribunal will have never heard from despite his being here for 17 years. This would then result in a further appeal which may take place years hence. Thus, the interests of justice also dictate that Tribunals can and should accede to adjournment requests if it will result in an Appellant being able to present their case to the best of their ability as it may otherwise lead to piecemeal part-determination of matters and the protraction of protection claims for longer than necessary. That is not to say that Tribunal Judges should always accede to such request, but in my view where the evidence is material to the claim, particularly a fresh claim and further appeal which has already overcome paragraph 353 of the immigration rules, the opportunity should be given to present that remaining evidence as otherwise it may not result in a fair hearing. At the same time, I do consider that it is the duty of a legal representative to not demonstrate lapses in presentation of the evidence as may have occurred here which may otherwise warrant an explanation for lapses in professional conduct to a Resident Judge.

7. I shall deal with the remaining grounds more succinctly given that I have already identified a material error that warrants the decision be set aside in its entirety.

8. In respect of ground two and the complaint that the judge treated the previous decision of 12 September 2006 as a legal strait jacket and failed to consider the new evidence alongside the old evidence and treats the failure to adduce the evidence in 2006 as determinative of the appeal, noting §§15, 56, 63, 66 and 76 that are referenced in the grounds, I note that in these paragraphs the judge does state the need for a good reason to consider the evidence as it could have been put before the previous judge but was not. However, as Mr Clarke rightly pointed out this is merely a part of the approach that has been approved in Devaseelan at [42(7)]: “(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him”.

9. Turning to ground three and the treatment of the wholly new evidence, as Ms Iqbal highlighted, the judge did not examine the medical of the wife including photos of her tomb and the religious ceremony which clearly post-date the previous Judge's decision. Instead the judge did not engage with the manner of death and how it occurred from §47 onwards. The judge appears to be discussing discrepancies she notes and raises queries but never directly addresses the documents nor their content making it difficult to find that they have been taken into account as Mr Clarke sought to persuade me. Mr Clarke rightly highlighted that the discrepancies pointed to had not been challenged on appeal. However, given the importance of the medical certificate pointing to her death being caused by "traumatic brain injury + internal chest trauma from 2 assault (torture)" (noted as present at §24(a)) and the other evidence of the wife's death, the complaints as to the lack of a witness statement and other supporting evidence mean that the contents of the documents have not been squarely addressed and were instead discounted based upon the lack of corroboration and the judge taking a 'world view' of the evidence without directly grappling with it. This was not open to the judge to do in line with Devaseelan. As the Appellant cannot be confident that the new evidence has been directly addressed before it was determined that the starting point of the decision in 2006 could not be departed from.

10. Turning to the complaint in ground four that the judge failed to give adequate consideration to the background country evidence, Ms Iqbal highlighted that §13 of ASA, entitled objective risk contained background evidence at [AB/101] onwards that was not considered by the judge which pertained to overall background evidence which corroborated the risk to someone of the Appellant's claimed profile the account he gave of his trouble faced in Uganda as member of the FDC. This complaint, whilst correct, is ancillary to the previous matters which were more pressing and is not an error given that no specific item is pointed to that would have altered the outcome.

11. Finally, in relation to the Article 8 assessment, I find that the judge did give consideration to the Appellant's circumstances at §§70-71. In relation to the criticism at §78, Mr Clarke accepted that the criticism was fair and that NHS treatment can be utilised by asylum seekers, but rightly pointed out that even if this were not a factor that went against him it could only be taken neutrally and would not point to the public interest being outweighed.

12. I therefore find that the judge has materially erred for the reasons given above in respect of grounds 1 and 3.

Notice of Decision

13. The Appellant's appeal is allowed in part.

14. Given that I have found material errors in respect of the protection claim, I set aside all paragraphs pertaining to that element of the decision; but I preserve §§70-74 of the decision and the disposal of the Article 8 claim (whilst noting that the criticism of his claiming NHS treatment is an immaterial error of law in the Article 8 assessment in so far as he is an asylum seeker).

15. The Appellant's Article 8 claim remains dismissed.

16. The Appellant's protection claim is remitted to the First-tier Tribunal to be heard *de novo* by any judge other than First-tier Tribunal Judge Norris

Judge P Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber