Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: PA/04072/2017

THE IMMIGRATION ACT

Heard at Field House	**Decision & Reasons Promulgated**
On 8th February 2018	**On 23rd February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

HB

(Anonymity Direction made)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Deborah Revill Counsel instructed by Hunter Stone Law Solicitors

For the Respondent : Ms Isherwood Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the Bangladesh. Having considered all the circumstances, I consider it appropriate to make an anonymity direction.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge M P W Harris. By decision promulgated on 27 June 2017 Judge Harris dismissed the appellant's appeal against the decision of the respondent to refuse her asylum, humanitarian protection or relief otherwise on human rights grounds either under Articles 2 and 3 or under Article 8.

3. By decision dated 6 December 2017 Upper Tribunal Judge Kamara granted permission to appeal to the Upper Tribunal in the following terms:-

2 It is arguable that in refusing the application to adjourn this protection appeal for the appellant to be adequately represented, the judge arguably,

failed to adhere to the guidance in Ngaiwe (adjournment: fairness) [2014] UKUT 481 (IAC).

4. It is only on the basis of the refusal of the adjournment application by the appellant that leave was sought and granted. It is argued that in refusing the adjournment the judges failed to consider whether there was good reason to adjourn and failed to take consider whether the case could be fairly and justly determined.

Factual background

5. The appellant first entered the United Kingdom in 24 October 2009 to study. It appears that the appellant stopped studying after approximately 9 months because she could no longer afford the course and living expenses. The appellant did not have leave to work. On ceasing studying the appellant did not leave the United Kingdom but remained.

6. It is also to be noted that the appellant had at the time and has now at least 2 brothers in the United Kingdom with their families. There is no suggestion that the brothers and/or their families are in the United Kingdom without lawful leave. Prior to coming to the UK the appellant claims that she was living with her elder brother and his family in Bangladesh.

7. In 2011 the appellant met KM, who is also a Bangladesh national. The appellant met KM, whilst she was working in a shop. It appears that they became friends, exchanged telephone numbers and ultimately a relationship developed.

8. The appellant applied for leave to remain in the United Kingdom outside the rules on 13 October 2012. This was refused on 8 October 2013. Despite the refusal of the application, the appellant continued to remain in the United Kingdom.

9. In January 2014 the appellant told her sister-in-law that she wanted to marry KM. It is suggested that the appellant's brothers and their families in the United Kingdom agreed to the marriage but the elder brother in Bangladesh did not. It is claimed that the family in Bangladesh wanted the appellant to marry a cousin in Bangladesh.

10. The appellant married KM on the 4th May 2014. KM's status to enter and remain in the United Kingdom prior to the application is unclear. At the time of the present application he became a dependant upon the appellant's application. It does not appear that KM otherwise had any status to remain in the UK in his own right. The appellant and KM appear to be living with one of the appellant's brothers and his family.

11. On the 7th October 2016 the appellant claimed asylum. The basis of the appellant's claim was that she could not return to Bangladesh with her husband as her family in Bangladesh did not accept her marriage and she and her family would be at risk on return to Bangladesh from her brother and from the cousin.

12. The substantive asylum interview took place on 7 April 2017. At the time of the interview the legal representatives for the appellant were MR Solicitors, who were in attendance at the interview.

13. The application for international protection or right otherwise to remain on human rights grounds was refused by decision dated 13th April 2017. MR Solicitors on the 26th April lodged a Notice of Appeal on behalf of the appellant. MR Solicitors by covering letter with the grounds of appeal notified the Tribunal on the 26th April that they were acting on behalf of the appellant.

14. Thereafter by fax dated the 27th April 2017 Hunter Stone Law gave notice that they were representing the appellant. That fax was sent at 17.35 hours on the 27th April and stamped as received on the 28th at Arnheim House, the IAC Tribunal back office.

15. As part of the submission before me it was being asserted that the appellant was dissatisfied with the work of MR Solicitors but no details or substance have been given as to the reasons for such dissatisfaction. Equally there is no evidence from MR Solicitors to confirm or deny any of the later allegations made against them, that they did not expeditiously send the file to the appellant's new representatives. It may be that they had a right to retain the file until the appellant paid for the work done. Such is speculation at best and is not to be acted upon. However there is no evidence from MR.

16. By Notice from the Tribunal dated and sent out on 27th April 2017 by Hatton Cross hearing centre the appellant and MR Solicitors were notified that the Pre-Hearing Review of the appeal would take place on the 11 May 2017 with the full hearing listed for the 25th May 2017. Clearly the notice was sent out at a time prior to receiving notice that Hunter Stone Law were acting. The notice of hearing was also sent to the respondent.

17. As stated Hunter Stone Law by fax stamped as received on the 28th April 2017 notified the Tribunal that they were acting. Whilst Hunter Stone Law have alleged that they also notified the respondent, as asserted in paragraph 4 of the grounds applying for leave to appeal, the respondent has denied that they were ever given notice. No evidence has been submitted by the Hunter Stone Law to substantiate that they gave notice to the respondent.

18. The respondent maintain that they had not had notice of any representative other than MR. The respondent served their bundle in the case on MR Solicitors. The respondent's bundle was received by the Tribunal on 19 May 2017.

19. By fax of the 10th May 2017 timed at 18.02 Hunter Stone Law again notified the Tribunal that they were acting and provided a signed authority to act from the appellant. With that letter Hunter Stone Law submitted a Reply Notice for the Pre–Hearing Review. By the Reply Notice the appellant and the representatives were indicating that they were ready to proceed with the appeal. Indeed in the grounds for leave it is acknowledged that as far as the appellant and Hunter Stone Law were concerned the case would be ready to proceed on the 25th May. Again there is no evidence that Hunter Stone Law notified the respondent or requested a copy of the bundle from the respondent.

20. Within the reply notice no witnesses other than the appellant were identified or named; no expert report was required; no technical issues or issues of law were notified or raised, whether in the notice or in the covering letter. There was no other material information. There is no suggestion that other members of the appellant's family were intending to give evidence. The evidence appears to have been coming from the appellant alone.

21. I would note that there was nothing to prevent Hunter Stone Law from taking a statement from the appellant or indeed from any other witness and dealing with the issues raised in the refusal letter. The case remained listed to proceed on the 25th May.

22. On 23 May 2017 timed at 11.57 by fax Hunter Stone Law made an application for an adjournment. The grounds set out are:-

    i) They had not received their client's previous file of papers from the previous representatives, MR Solicitors.

    ii) The only document, which the appellant had, was the refusal letter. The copies of the screening interview and substantive interview were with the previous solicitors, as well any recording of the interview. Hunter Stone Law knew of no reason why the previous solicitors had not forwarded the file.

    iii) They had requested the transfer of the file on 27 April 2017 with a follow-up letter of 8 May. They had telephoned the previous solicitors on 12 May and been promised the file would be sent on the 15th May.

    iv) They further contacted MR, although no date is given, and again discovered that no action had been taken to send the file.

    v) They had not received the respondent's bundle.

    vi) In the circumstances they felt that they could not fully and properly prepare the appellant's claim. In the absence of the screening interview or the substantive asylum interview they could not prepare a detailed statement from the client and could not address the issues raised in the reasons for refusal letter.

    vii) They requested that the appeal be adjourned for 4 weeks.

23. The application for an adjournment was considered by Designated Judge Manuel at Hatton Cross and the application was refused. The reasons given for refusing the application are: –

    The appellant entered the UK in 2009. She has had ample time to prepare. The previous solicitors' file is not needed. This is a straightforward appeal.

24. Clearly the judge was satisfied that there was no good reason to adjourn and that the case could be justly determined given that the appellant had had ample time to put her case in order.

25. By fax of 24 May timed at 16.26 Hunter Stone Law renewed their application. Amongst other things it was suggested that it was material that

the appellant's problems had only started after she married and not in 2009 as suggested in the original refusal of the adjournment application. The appellant had married in 2014 and had known, on her version of events, that her family in Bangladesh did not agree to the marriage at that time. The appellant had had 3 years in which to prepare her claim and had not claimed asylum for some three years during which time she had been able to instruct solicitors and ensured that she was represented at the asylum interview.

26. It is further suggested that in an asylum appeal it was necessary for the appellant to have the screening and substantive asylum interview to enable solicitors to prepare a statement. This was an appeal centred on the appellant's account and the credibility of that account. There was nothing that prevented the solicitors taking a statement setting out the basis of the appellant's claim. There was nothing stopping the solicitors from requesting a bundle from the respondent if that was all that was necessary to prepare the case.

27. The respondent's bundle other than the interviews contain a single document submitted by the appellant from the Bangldesh Islami Satir Shongsta, which merely confirms the appellant's address in Bangladesh. There were no other supporting evidence or documents submitted to the respondent.

28. As a final matter in paragraph 14 of their renewed application for an adjournment Hunter Stone Law set out the following:-

14 Please note that if the Tribunal is still not minded to grant an adjournment in this case we have advised the Appellant not to attend the hearing as we have been unable to advise her in detail in relation to her case without the necessary papers. We cannot prepare the appellant for the hearing and address the issues raised in the RFRL without the file of papers. As such if an adjournment is not granted in this case and the Tribunal still wish to proceed with the hearing then we request that the Tribunal make a decision on this case on the information before them and will proceed with the onwards appeal process in relation to this issue.

29. On 25 May 2017 the appeal appeared before Judge Harris. The judge considered the adjournment request as is evident from paragraphs 8 to 12 of the decision. Having refused the adjournment the judge went on to decide the appeal on the basis of the evidence and dismissed the appeal.

30. As set out above the only basis for challenging the decision of Judge Harris is that an adjournment should have been granted.

Legal framework

31. In exercising the power to grant an adjournment Rule 2, 4 and 28 of the Tribunal Procedure Rules 2014 are relevant. They provide: –

2 Overriding objective and parties' obligations to cooperate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with the case fairly and justly includes-

a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated cost and the resources of the parties and of the Tribunal;

b) avoiding unnecessary formality and seeking flexibility in the proceeding;

c) ensuring, so far as is practical, that the parties are able to participate fully in the proceeding;

d) using any special expertise of the Tribunal effectively; and

e) avoiding delay, so far as compatible with proper consideration of the issues.

4 Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may-...

(h) adjourn or postpone a hearing

....

28 Hearing in a party's absence

(1) If a party fails to attend the hearing the Tribunal may proceed with the hearing if the Tribunal-

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing

32. The appellant's representatives are seeking to assert that in accordance with the overriding objective the case could not be decided justly and fairly. The appellant's representatives seek to rely upon the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418. It has to be noted that the case is based upon the 2005 Procedure Rules. However it is suggested that the principles set out in the case are applicable in the present case.

33. In Nwaigwe the representatives of the appellant's representatives had written to the Tribunal indicating that the appellant was ill and could not attend the hearing. The judge had heard the appeal but in so doing had considered whether there was good reason to adjourn and not the element of whether the appeal could be fairly and justly determined. [see paragraph

10]. The judge had accordingly failed to apply the dominant test of fairness and had misdirected himself.

34. The Nwaigwe case makes reference to SH (Afghanistan) v SSHD [2011] EWCA Civ 1284. While the case was a case dealing with the fast-track procedure, it still involved a request for an adjournment. Lord Justice Moses at paragraph 8 states:-

8 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 (R v Secretary of State for the Home Department ex-parte Fayed [1998] 1 WLR 763-777)

35. In the headnote of Nwaigwe Mr Justice McCloskey sets the matter out in the following terms: –

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 consideration; 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 (First-tier Tribunal) acted reasonably. Rather, the test to be applied is that of fairness: was there a deprivation of the affected parties right to a fair hearing?

36. Reliance is also placed on the case of AK (Iran) v SSHD [2008] EWCA Civ 941. I note within the decision of Lord Justice Sedley, paragraph 12 onwards, the issue with regard to adjournment was that the legal representatives had abandoned the appellant the day before and were not in attendance at the hearing. The appellant was in attendance at the hearing. The comment by Lord Justice Sedley at paragraph 13 is worthy of note:-

13... we are concerned that any lawyer should consider it permissible to withdraw from representing client the day before the hearing, when no alternative representation is available.

37. In the present circumstances Hunter Stones Law are not suggesting that they were withdrawing from representing the client merely that they were refusing to accept the decision of the Tribunal and were advising their client not to accept the decision of the Tribunal. Indeed Hunter Stones Law continue to act for the appellant even instructing counsel to represent the appellant before me. Hunter Stone Law had not abandoned the appellant but had flouted the order of the Tribunal and determined not to comply with the Tribunal decision to refuse the adjournment. They had not abandoned their client but decided not to attend and advised their client not to attend.

38. The conduct of the solicitors, Hunter Stone Law, is not one that is to be commended and leaves much to be desired.

39. However equally it is for an appellant to pursue their claim to protection with due expedition and diligence. There was much to be made of the point by the judge who originally refused the adjournment that this was a simple case given the responses within the Reply Notice. The evidence consisted of the account given in interview by the appellant. There was nothing otherwise in the evidence. Had the appellant and her representative attended, there was no additional evidence produced by the respondent that would take them by surprise. The basis of the assessment of the case by the respondent had been on the basis of the appellant's account alone.

40. As no other evidence had been submitted it was in principle a matter of taking a statement from the appellant. No other witnesses have been notified. No expert evidence was required. No technical areas of law had been raised. No other documentary evidence had been submitted. There was in the circumstances no good reason for adjourning the hearing. Even at that stage had approaches been made to the respondent no doubt a copy of the bundle could have been obtained. The respondent's bundle are available as attachments to emails.

41. I note that at the time of the hearing before me there was still no appellant's bundle and no application to admit further evidence. The directions from the Upper Tribunal are that the cases should be ready to proceed to be reheard if an error of law is found. I put such considerations aside as I am considering the circumstances as at the time of the decisions to refuse the adjournments.

42. As pointed out in the cases a person should have an opportunity of answering any adverse evidence. In the instant case the only evidence was the interviews. The Reasons for Refusal Letter had clearly set out the issues. Judge Manuel and Judge Harris had specifically considered the nature of the evidence against the appellant and was satisfied that there was no good reason for an adjournment.

43. I would note in concluding the issue of whether the appeal could be fairly decided Judge Harris specifically considers the issue of fairness as is evident from penultimate sentence of paragraph 12. The judge specifically considers the issue of fairness and whether or not an individual could have a fair hearing and gives reasons why the failure of the appellant to attend would undermine the very claim that she could not receive a fair hearing.

44. There is nothing to indicate that had the appellant attended and given evidence, that a judge may have found that the appellant's case was credible, truthful and correct. On the basis of such findings the judge would then have to apply the law to the evidence and determine whether or not on the appellant's version of events the appellant had made out that she was entitled to international protection.

45. It was not the denial of the adjournment, which prevented the appellant from attending and giving evidence. It was the decision by the appellant not to attend, albeit on the advice of her solicitors. As stated it is not for solicitors to ignore and flout Court or Tribunal rulings, although that may be reflect in other orders rather than in determining that an appeal should proceed. It was for the appellant to attend and give evidence. If it became apparent that there was a problem with the non-attendance of the

representatives on the day or that otherwise the appellant was seriously prejudiced by reason of the fact that she did not have the Home Office bundle then clearly it may be that the refusal of the adjournment at that stage deprived her of the opportunity of a proper hearing. In the present circumstance it was for the appellant to pursue her appeal with due diligence and it was her failure and the failure of her representatives to do so which prevented her from participating in the hearing.

46. That was a decision of the appellant and her representative. The appellant has a duty to pursue her claim to international protection in an appropriate and effective manner.

47. Further to that one has to consider the reasons given by Judge Harris for refusing the adjournment. The judge has clearly examined the circumstances and has given detailed reasons in the judgement as to why he determined that he could fairly and justly decide the case. The judge had raised a number of issues and initially as pointed out in the reply by the respondent those had not been challenged by the appellant's representative. If the only issue was collection of the file, then as pointed out by the judge there was nothing to stop the appellant collecting her file from her previous representatives. If they required copies of the interviews, again there was nothing to stop the representatives seeking copies from the respondent.

48. As a final matter I would note the directions issued by the Upper Tribunal indicate that if there is found to be an error of law the remaking of the decision will take place at the same hearing. Despite acknowledging that they had received the Home Office bundle since the hearing in the First-tier Tribunal no further evidence has been submitted in support of the appellant's case. No application has been made under rule 15 (2 a) for the admission of further evidence.

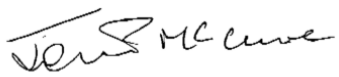
49. In the circumstances I do not find that there is any material error of law in the decision of Judge Harris. The judge was entitled to proceed with the hearing. The judge took into account all relevant considerations in assessing whether or not the appeal should been adjourned. In that event the judge has considered not only whether there was good reason but also whether or not it was fair and just. In the circumstances the judge was entitled to determine the appeal on the basis of the evidence before him.

50. For the reasons set out I find that there is no error of law in the decision.

Notice of Decision

51. The appeal of the appellant is dismissed.

Signed



Deputy Upper Tribunal Judge McClure

Dated 18th February 2018