UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: AA/03258/2015**

THE IMMIGRATION ACTS

Heard at: Birmingham	**Decision and Reasons Promulgated**
On 4 February 2016	**On 3 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR MAHDI SOLEIMANI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Pipe, instructed by TRP Solicitors
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge who, in a decision promulgated on 4 June 2015, dismissed his appeal for international protection and human rights.

2. The appellant is a national of Iran born on 19 July 1985. He claimed asylum on arrival in the UK on 15 March 2014. The claim was refused on 10 February 2015. Mr Pipe did not represent the appellant at the hearing. He was represented by counsel, Ms Norman.

3. On 10 October 2015, Deputy Upper Tribunal Judge Chapman granted the appellant permission to appeal on the grounds relied on. Those grounds contended that the Judge erred: in failing to grant the appellant an application for an adjournment and in not giving reasons for the refusal; in making a negative reference to the fact that the appellant had not made a complaint against his former solicitors, who had closed down; in his treatment of a document and the subsequent finding that it impacted on the appellant's credibility as a whole and finally in making findings without providing any basis for such finding.

4. At the hearing before the First-tier Tribunal it appears that Ms Norman referred to the various difficulties associated with the preparation of the appellant's case, and in particular the problems with his former representatives. She made an initial application for an adjournment. The Judge then allowed her further time to prepare a statement in manuscript. Ms Norman had not received the respondent's bundle which was only handed to her on the day.

5. It is evident from the record of proceedings contained in the file that Ms Norman again applied for an adjournment. The Judge at [18] was satisfied “after allowing time” that it was in the interests of fairness to proceed. He accordingly rejected the application for an adjournment.

6. In a document produced by Mr Mills from the Home Office Presenting Officer, there is reference to a preliminary issue raised. The appellant had noted that he had problems with his previous solicitors, Bake and Co, whose firm had closed down. The case was then transferred to Genesis whom the appellant claimed did not deal with his case properly. Mr Mills informed me that although Bake and Co closed down, those who had been employed by Bake and Co also went to Genesis. After the appellant was dissatisfied with Genesis, he went to JM Wilson Solicitors in March 2015. The appeal had been set down to be heard on 20 May 2015.

7. However, the appellant's funding was only approved on 15 May 2015, a few days before the hearing. His solicitors prepared a very short bundle of some 16 pages including an undated statement from the appellant. As part of the bundle there was a Farsi document produced together with the translation.

8. That translation from Farsi referred to a warning notice relating to the appellant had allegedly been issued by the Ministry of Justice of Iran. The appellant's name is set out, including that of his father. The address is also set out. The “warning notice” required the appellant to attend the Tehran Revolutionary Court on 27 August 2014 at 9am. The summons related to a charge of having an illegitimate relationship, trespassing and raping “you are notified to attend the Court at the appointed time.” The date of issue was 3 August 2014. The document is said to have been served on 8 August and was “signed and sealed by Branch 26 of the Tehran Revolutionary Court.”

9. The appellant also provided a copy of a summons with a translation indicating that he had been required to attend Court on 9 July 2013 to answer an allegation of drinking alcohol.

10. At the hearing the appellant produced his “supplementary statement. This has been typed. It was evidently not prepared at Court.

11. The Judge notes that at the hearing, Ms Norman called the interpreter who assisted the appellant and counsel at court. He stated that he is the registered interpreter. He was aware of the difficulties experienced by the appellant in dealing with his former solicitors. It was within his knowledge that the firm had closed down because he used to work for them. [20]

12. Ms Norman had prepared a short statement in manuscript dealing with the errors in the appellant's statement of 30 June 2014. There are 21 paragraphs in all, setting out the errors.

13. It appears from paragraph 7 of the grounds of appeal, that Ms Norman indicated to the Judge that there had been various difficulties with regard to the preparation of his case having regard to the problems with his previous representatives. She noted that counsel did not have a copy of the respondent's bundle which was only provided to the appellant by the presenting officer at the hearing [18].

14. It is thus asserted that the appellant was put into the position where he had to prepare a statement with counsel on the day of the hearing. He contended that it is highly irregular and unsatisfactory for a statement to be prepared this way in an asylum matter. Moreover this is not usually a task undertaken by counsel.

15. At [21] the Judge noted that the appellant prepared two statements at Court.

16. In the course of his submissions Mr Pipe referred to Rule 2 of the 2014 First-tier Procedure Rules setting out the overriding objective which in particular is to enable the Tribunal to deal with cases fairly and justly. This includes dealing with the case in ways which are proportionate to the importance of the case and the complexity of the issues. The objective is also to ensure so far as is practicable that the parties are able to participate fully in the proceedings. The avoiding of delay, so far as is compatible with proper consideration of the issues, is an objective. The Tribunal must give effect to the overriding objective when exercising any power under the rules.

17. He referred to the case management powers at Rule 4 which provides that the Tribunal is entitled to adjourn or postpone a hearing.

18. He submitted that apart from a brief reference by the Judge to being satisfied that it was in the interests of fairness to proceed, he has given no reasons for such a finding. Mr Pipe submitted that “fairness has not been done.” The situation in which the appellant found himself had not been

occasioned through any fault by the appellant himself. In fact, at [32] it was noted that the discrepancies relied on by the respondent were small and arose because of the poor conduct of the appellant's first solicitor. He did not speak English and was reliant on others.

19. Mr Pipe relied on the Upper Tribunal decision in Wagner (Advocates' conduct – fair hearing) [2015] UKUT 00655 (IAC) at [11]. The Tribunal held that with regard to the right of every litigant to a fair hearing, there are a wide variety of contexts in which every case is invariably fact sensitive. The central tenet to the right to a fair hearing is having the opportunity to put one's case and to respond on all material issues. Regard was had to the decision in MM (Unfairness: E & R) Sudan [2014] UKUT 105 in which the Tribunal noted that it is doctrinally incorrect to adopt a two stage process of asking whether there was a procedural irregularity giving rise to unfairness and if so whether this had any material bearing on the outcome. These are two elements of a single question, namely whether there was procedural unfairness.

20. An appellate court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

21. Mr Pipe also adopted the second ground of appeal with regard to [35] of the determination where the Judge noted that the appellant had not made a complaint against the former solicitors. However, the Judge had earlier heard evidence that the firm of solicitors had closed down [20]. There was accordingly no-one to complain to.

22. The third ground related to the finding at [40]. The Judge was not persuaded that the document presented was a genuine document and attached no weight to it. He went on to find that the use of such a document undermined the appellant's credibility generally.

23. It is asserted that the Judge erred in attaching no weight to the document. The Judge accepted that the respondent's submission regrading service of a document fell away. Accordingly, the only justification left for attaching no weight to the document was the appellant's family's failure to disclose the existence of the document sooner.

24. It was however not open to the Judge to find that the appellant's general credibility was damaged regardless of the weight he chose to attach to the document. Mr Pipe relied on the decision in R v IAT ex parte Gomes – Salinas [2001] EWCA 287 (Admin) where Sullivan J, as he then was, stated that there have been instances where adjudicators have said in respect of a document produced by the claimant that he does not accept that the document is genuine, and therefore that casts doubt on the credibility of the claimant. In such cases, where the special adjudicator has effectively cast a burden on the claimant to demonstrate that a document is genuine and then reached adverse credibility findings because the appellant has

failed to discharge that burden, the courts have been prepared to quash adjudicators' decisions on applications for judicial review.

25. It was finally submitted that the findings by the Judge regarding his relationship with Linda lacks credibility. The contention is that the Judge "...made a number of statements without providing any basis for his findings". These appeared to be nothing more than assumptions on the part of the Judge in conflict with MK (Duty to Give Reasons) Pakistan [2013] UKUT 00641 (IAC), where the Tribunal stated that it is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision. If a Tribunal finds oral evidence to be implausible, incredible, unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.

26. Mr Pipe submitted that in the circumstances, the decision should be set aside and remitted to the First-tier Tribunal for a fresh decision to be made.

27. On behalf of the respondent, Mr Mills submitted that it is clear that the solicitors JM Wilson to whom the appellant had gone in March 2015 according to the presenting officer's summary at the hearing, only had their funding approved on 15 May 2015. That was five days prior to the hearing.

28. Despite not being funded until a few days before the hearing, there was nothing stopping him from attending the CMR. All they produced however was a short bundle including a statement from the appellant, a warning notice and other documents. A statement from the appellant in response to the refusal letter was produced at the hearing which was not signed and dated. What the Judge did then was to put the case to the back of his list to afford the appellant's counsel an opportunity to draft a statement.

29. Mr Mills accepted that the 2014 Procedure Rules emphasised that the overriding objective was to enable the Tribunal to deal with cases fairly and justly. The Tribunal in exercising any power under the rules must give effect to the overriding objective. Under the 2005 Procedure Rules it was stated that the Tribunal must not adjourn the hearing of an appeal unless satisfied that the appeal cannot otherwise be justly determined. He accepted that the current approach in this respect emphasises fairness.

30. He submitted that the Judge at [18] had in fact satisfied himself that having allowed time, it was in the interests of fairness to proceed. Although that was 'sparse', he was entitled to come to that conclusion. Extra time had been given to provide statements.

31. The findings with regard to the making of a complaint against the original solicitors was proper, even though the solicitors were no longer in practice.

The individual solicitors could still be targeted. Mr Mills noted that the solicitors had re-formed as Genesis Law.

32. Moreover the Judge was entitled to look at how the document came to be produced so late in the day. The findings were open to him on the evidence. It matters not that another Judge might have come to an opposite conclusion.

33. Mr Pipe stated in reply that the submissions relating to the conduct of the solicitors JM Wilson, who had no funding at the time, was speculative. He asked rhetorically: 'Why would they have been obliged to come to the CMR in the absence of funding?' They cannot be criticised for not attending that hearing.

34. Finally, even though Ms Norman had been given an opportunity to take a statement, she still sought an adjournment and renewed her application. This is evident from the Judge's own record of proceedings at pages 4-5.

35. Under the 2005 Rules there had to be good reasons for an adjournment and there was a presumption that a case should not be adjourned. The position today is that fairness is the benchmark.

Assessment

36. It was evident from the determination itself that at the outset of the proceedings, experienced counsel, Ms Norman, set out the various difficulties she had with regard to the preparation of the appellant's case; these had arisen in consequence of problems with his former solicitors. The current solicitors had not been supplied with a copy of the respondent's bundle. It was only on the day of the hearing that a respondent's bundle was given to her.

37. It is evident that Ms Norman did her best in the short time available, to produce a manuscript statement from the appellant, who does not speak English. That statement related to errors that the appellant claimed had occurred in his statement of 20 June 2014. She managed to produce a 21 paragraph statement which was clearly time consuming. She also had to familiarise herself with the contents of the respondent's bundle and attempt to communicate the respondent’s assertions to him.

38. It appears from the determination that Ms Norman renewed her application for an adjournment. The record of proceedings does not set out the basis of that application. All the Judge states at [18] was that “I was satisfied after allowing time that it was in the interests of fairness to proceed.”

39. However, no reasons are given as to how or why he was satisfied. Nor did he deal in terms with any of the later and further submissions advanced by Ms Norman.

40. It is evident that the appellant had problems with his previous representatives, Bake and Co, who closed down. The appellant was then transferred to Genesis Law whom the appellant claimed did not deal with his case properly. That resulted in turn with his case being transferred to JM Wilson in March 2015.

41. It is correct, as submitted by Mr Mills, that JM Wilson had been instructed in March 2015. However, funding was only approved on 15 May 2015. It is also stated in the presenting officer's notes of the hearing that “he has had the original court document which he received on 15 May 2015.” It is not clear what the “original court document” comprises.

42. What did transpire is that the solicitors sent a letter to the Tribunal two days prior to the hearing enclosing a copy of his bundle. There was also a request for a copy of the respondent's bundle. The solicitors had been in possession of the refusal letter dated 10 February 2015. The full bundle however had not been provided.

43. In the short space of time the solicitors nonetheless produced a statement from the appellant in reaction to the reasons for refusal, as well as enclosing various documents, including the warning note.

44. It is also evident from the presenting officer's notes of the hearing that an adjournment had also been sought to make a complaint against the previous solicitor. That was refused. However, there does not appear to be any reference to that particular application. The Judge in fact stated at [35] that no complaint had been made against the former solicitors who were not able to answer the appellant's allegations. The Judge nevertheless made a “negative reference to the fact that he had not made a complaint against the former solicitors” (Ground 2).

45. Having regard to the circumstances set out, I am satisfied that Ms Norman was placed under great pressure in attempting to comply with the Judge's grant of time to prepare a statement on the day of the hearing. She also had to familiarise herself, as far as practicable in the time allotted, with the contents of the respondent's bundle. There was also the added difficulty of the appellant's speaking in Farsi. The Judge noted at [21] that he wrote his statement in Farsi and had it translated into English with a friend over the telephone.

46. I find that to be unsatisfactory because, as contended, there was no information regarding the friend's level of English and the accuracy or otherwise of the translation.

47. I have also had regard to the decision relied on by the appellant, namely, Nwaigwe (Adjournment: Fairness) [2014] UKUT 000418 (IAC) at [7], which was not referred to or considered by the First-tier Judge.

48. The President held that a decision to refuse to accede to an adjournment request could in principle be erroneous in law in several respects. Amongst them is denying the party concerned a fair hearing.

49. In most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. When an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal 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? Any temptation to review the conduct and decision of the First-tier Tribunal through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.

50. I find having regard to the circumstances as a whole, that the refusal to provide the appellant with the adjournment sought resulted in unfairness. He was deprived of a right to a fair hearing.

51. I have also had regard to the further grounds relied on. In particular, even assuming that the Judge was not persuaded that the document produced was genuine and that he attached no weight to it, he was not entitled to find that the use of such documents undermined his credibility generally [40]. I have already referred to the statement of Sullivan J in this respect.

52. It appears that the Judge's justification for attaching no weight to the document was the failure by the appellant's family to disclose the existence of the document sooner.

53. The Judge has provided reasons for credibility findings made regarding the appellant's essential case at [41]. However, in the circumstances, given the erroneous reasoning concerning the warning notice at [40], it is not possible to find that those findings were not tainted by that error, including the problems that the appellant had experienced with his former representatives.

54. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set it aside.

55. Mr Pipe submitted, without opposition from Mr Mills, that this was an appropriate case to be remitted to the First-tier Tribunal for a fresh re-hearing.

56. I have had regard to the Senior President's Practice Statement regarding the issue of remitting an appeal to the First-tier Tribunal for a fresh decision. In giving effect to that statement, I am satisfied that the extent of judicial fact finding which is necessary for a decision to be re-made is extensive. Moreover, the appellant has been deprived of a proper opportunity of presenting and preparing his case. I have also had regard to the overriding objective and find that it is just and fair to remit the case.

57. The appeal is accordingly remitted to the First-tier Tribunal (Birmingham) for a fresh decision to be made by another Judge.

Notice of Decision

Having set aside the decision of the First-tier Tribunal, the appeal is remitted to the First-tier Tribunal (Birmingham) for a fresh decision to be made.

No anonymity direction is made.

Signed Date 24 February 2016

Deputy Upper Tribunal Judge Mailer