IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07754/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 15th January 2016	**On 15th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

N K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Neville (Counsel)
For the Respondent: Mr D Mills (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Nightingale, promulgated on 26th June 2015, following a hearing at Hatton Cross on 18th June 2015. In the determination, the judge dismissed the appeal of the Appellant, who subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Namibia, born on 14th January 1986. He appealed against the decision of the Respondent dated 17th September 2014, refusing him leave to enter the UK as a refugee and also directing his removal to Namibia.

The Appellant's Claim

3. The Appellant's claim is that he is a gay man and that at the age of 21 he had a relationship with a woman called Violine, but this relationship ended after a year and he was not attracted to her. The following year he met a man called Marvin and after a time of being friends they began a relationship. The Appellant also claimed to be involved with a group which had campaigned on behalf of LGBT community in Namibia. He also claims that after his father died in August 2013, his uncle and his cousin beat him up and that he was then raped by the uncle on numerous occasions.

The Judge's Findings

4. At the hearing before the judge on 18th June 2015, there was a preliminary matter which the judge expressly dealt with. This was an application for an adjournment made by the Appellant's representative, in order to obtain a medico-legal report in respect of the Appellant's scars. This had not previously been done by the earlier solicitors who were awaiting funding. However, as the judge heard, the Appellant's representative had previously advised the solicitors, following the adjournment on 7th May 2015, that the Appellant had instructed her that he had a number of scars with regard to the rape and the ill-treatment that he had endured. These needed investigating by virtue of a medico-legal report. The solicitors had then applied for funding on 20th May 2015. They had not received a reply to that request. They made a further request on 8th June 2015. They received no response. Two experts had been identified by the solicitors. However, Counsel for the Appellant, "accepted that the adjournment application had only been made by those instructing her the day before the hearing and made too late to be considered prior to the morning of the hearing" (see paragraph 25). The judge went on to conclude that the Appellant's hearing had been adjourned twice previously. She held that the Appellant's solicitors must have been well aware that given the contents of his asylum interviews and statements and given the nature of the claims made about ill-treatment a report might be appropriate. The judge held that, "indeed, I find it highly unlikely that any competent solicitor would not have previously considered whether to make such a reference" (see paragraph 26).

5. The judge also went on to consider in the public interest the anticipated costs of an adjournment. Consideration was also given to the fact that the Appellant had asked for a Ojitherero interpreter and one had been obtained and brought at considerable expense in circumstances where, "there had been no indication that there would be any request to adjourn

from the Appellant's representative or, indeed, any attempt at all to safeguard against unnecessary public expenditure in booking a specialist interpreter from an outside provider" (paragraph 27). All things considered, the application for an adjournment was rejected by the judge.

6. The judge then went on to consider the oral evidence and the submissions made. The judge observed that notwithstanding the Appellant's claim that he needed an interpreter, and especially at the time of the asylum interview, in evidence before her,

> "I found it notable that the Appellant repeatedly in his evidence before me, reverted to English, sought to answer questions before they were interpreted into Ojitherero and had to be told by me on at least three occasions that he must wait for the question to be translated and answer the question in Ojitherero" (paragraph 66).

7. The judge further observed that when the Appellant arrived in the UK on 18th December 2013 he was interviewed by an officer and he "... gave no indication that he was in any way fearful" (paragraph 67). Furthermore, the Appellant in the course of the interview,

> "Gave a detailed account of a wife who worked as a nurse and who had not been able to come with him as she was unable to take time off work. He had a return ticket, explained he was a Manchester United supporter and produced a ticket for his attendance at the match as well as proof of the pre-booked bed and breakfast accommodation" (paragraph 68).

8. In the end, the judge did not believe the account given by the Appellant and found him to be an untruthful witness. She held that,

> "The Appellant has been wholly inconsistent with regard to his employment. He presented himself as an employee of Busy Bees on arrival, but at the screening interview said he had worked for six months as a security guard who he did not know." (paragraph 70).

Furthermore, the Appellant's account of his relationship with Violine, "... has also been wholly inconsistent" (paragraph 71). The judge considered the description of the Appellant's relationship with Marvin and held this, "... also to be inconsistent and riddled with discrepancies" (paragraph 72).

9. Ultimately, the judge concluded that the Appellant's evidence was given "in a vague and evasive manner." The Appellant raised matters that were wholly relevant. The Appellant also "reads and writes English, and was able to read over and check his witness statements before me. He therefore had ample opportunity to correct any answers which were being mis-recorded in the course of his interviews" (paragraph 78).

10. The judge concluded that,

> "This is an Appellant who I have found to be wholly lacking in credibility on the lower standard applicable. He has been vague and evasive in evidence, has provided an inconsistent account and has admitted to telling lies. I reject his account in full and without reservation. It has not been

established that he is a gay man. It has not been established that he has ever been persecuted as a gay man ...” (paragraph 79).

The appeal was dismissed.

Grounds of Application

11. The grounds of application state that the judge erred in law by refusing an application for an adjournment made on the basis that a medico-legal report had not been completed although two experts had been identified to potentially write the report. The Appellant’s representatives accepted that in hindsight it would have been appropriate to make an application for funding at an earlier stage, given the potential evidential force of such a report. However, it was unfair to the Appellant for the judge to hear the appeal without such potentially vital evidence being provided.

12. On 23rd July 2015, permission to appeal was granted.

13. On 4th August 2015, a Rule 24 response was entered to the effect that the Appellant’s solicitors would have been aware of the Appellant’s asylum claim and the fact that he had asserted from the outset that he was raped by his uncle and suffered ill-treatment. Yet it appears that there was no urgency in attempting to obtain medical reports. The judge gave adequate reasons at paragraphs 26 to 27 for refusing to adjourn the matter.

Submissions

14. At the hearing before me on 15th January 2016, I had the benefit from Mr Neville of Counsel of a well-compiled skeleton argument, which I have found of much assistance. Representing the Respondent Secretary of State, was Mr David Mills, a Senior Home Office Presenting Officer.

15. In his submissions before me, Mr Neville, relying upon the skeleton argument, submitted that there were three essential points. First, there was the refusal to adjourn in order to get medical reports for the scars that the Appellant claimed to have. The judge does not address the issue of whether a fair result could be achieved by an adjournment. The judge’s focus was very much on there having been two previous adjournments and considerable expenditure of the public purse, but no focus on the fairness of the result to the Appellant. It was not enough to say (at paragraph 26) that those representing the Appellant as his legal solicitors, had failed to act with due haste in order to apply for public funding to get a medical report. The main question was, notwithstanding their own failures, what the impact of that failure was upon the Appellant. Their failures should not be visited upon the Appellant.

16. Second, there was the ground that the Respondent’s own policy document, “sexual identity issues in the asylum claim” (dated 11th

February 2015) states that, "discussing matters such as sexual identity may be unfamiliar to some people and, in an official context such as an asylum interview, may prove additionally daunting." Therefore, sufficient allowance had to be made for this. Nevertheless, Judge Nightingale did not make such allowance. Full reasons were not given for the finding that the Appellant's explanation was lacking in credibility.

17. Third, the Appellant required an interpreter for his substantive interview. He spoke the Ojitherero language. It was difficult to get such an interpreter. The judge's evaluation of this issue is that at the hearing the Appellant spoke English and even wrote it. However, this overlooks the fact that the substantive hearing before the judge was on 18th June 2015. However, prior to that the Appellant had already been in the United Kingdom and his substantive interview was in March 2014. There was a period of some one year and three months during which time the Appellant had lived in London and in Birmingham. This was ample time for him to brush up on his English and to acquire a working knowledge of it. This was why at the time of the hearing before the judge, the Appellant actually did speak far better English than he would have done when he first arrived and was interviewed in March 2014. It was wrong to penalise the Appellant on this basis by saying that because he spoke English now he could not have intended to have an interpreter as a matter of necessity then.

18. For his part, Mr Mills submitted that since the President's decision in the well-known case on adjournments in **Nwaigue (Adjournment: Fairness) [2014] UKUT 00418**, it had become rather customary for people to apply for adjournments on both sides of these Tribunal hearings, if an adjournment had not been granted. However, there was a need for some perspective on this issue (see **Nwaigue (Adjourment: Fairness) [2014] UKUT 00418 (IAC)**).

19. Mr Mills submitted that the procedure Rules had also been changed to make it easier to appeal on the basis that adjournments had not been granted. However, there was no rule of law that if an adjournment was refused when asked for a viable appeal could be launched. One has to consider the impact of this on both sides. The judge did consider this impact on both sides. She was not bound to grant an adjournment. There had already been two previous adjournments for appeal hearings and the judge had rightly referred to the cost to the public purse.

20. In reply, Mr Neville submitted that **Nwaigue** has opened up a more tolerant approach to adjournments. There have been Rule changes. The context here was the competence of previous representation when a medical report had not been applied for, but also the identification of two experts who could now provide a report in a timeous manner. The judge did not consider these two aspects.

21. Yet, the importance of the interpreter to the Appellant was also important. For example, at the interview the Appellant had said in English that, "I

asked for my own language." When the interviewing officer states that this is difficult he also adds that, "a lot of questions have to be repeated. This highlighted the fact that some difficulty was being caused in relation to the absence of an interpreter in the Appellant's language at that stage. He asked that the error of law be found and the matter be remitted back to the First-tier Tribunal for a re-making of the decision.

No Error of Law

22. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision. First, the Appellant's solicitors were aware of the Appellant's asylum claim. He had, after all, asserted it from the outset. He had said that he was raped by his uncle and that he had suffered ill-treatment. Yet, no medical reports were commissioned. There had been two adjournments. When the judge herself was faced with an adjournment, it was on account of the application having been made only the night before, and the judge had regard to the public interest in the prompt and expeditious disposal of claims, and particularly where a claim had been so longstanding, and where the failure to procure a report could only be laid at the Appellant's legal advisor's door. The judge considered the matter painstakingly at paragraphs 26 to 27 before deciding to refuse to adjourn.

23. It has been submitted that the position is different now given the Tribunal judgment in **Nwaigue [2014] UKUT 00418**. In that case, however, the President, Mr Justice McCloskey, asserted that if the Tribunal is to refuse to accede to an adjournment request, then such a decision could be erroneous if, for example, there has been a failure to take into account all the material considerations, or if the Tribunal has had regard to immaterial considerations, or if the Tribunal has denied the party concerned a fair hearing. In essence, the main question here will be whether the refusal deprived the affected party of his right to a fair hearing.

24. The litmus test is that of a fair hearing. Rule 21 of The Asylum and Immigration Tribunal (Procedure) Rules 2005, provides that, "the Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined." Mr Justice McCloskey in **Nwaigue** was clear that, "in the Rules matrix outline ..... Rule 21(2) is a provision of critical importance," in referring to this very provision. As His Lordship explained the essential issue is whether the appeal can be "justly determined." The present case was not one where the parties were not represented or the Appellant was not in attendance. The present case was one where a medical report, which really ought to have been commissioned far earlier, than it actually was proposed to be commissioned, and still had not been done at the date of the hearing, led to the hearing being determined that was otherwise than, "justly determined."

25. This is a case, however, where the judge disbelieves the Appellant fundamentally on practically every important aspect of his claim. The judge noted that the Appellant actually had a wife, who worked as a nurse (see paragraph 68). The judge observed that he spoke English (paragraph 66). Also observed by the judge was the fact that the Appellant, when interviewed by an officer, gave no indication that he was in any way fearful of his life in Namibia (see paragraph 67). In fact, the judge was clear that the Appellant had told a series of lies and that his account was wholly inconsistent (see paragraphs 69 to 72).

26. Finally, the judge made this assessment expressly on the basis of "the lower standard applicable" and found the Appellant "to be wholly lacking in credibility" (see paragraph 79). She did not believe the Appellant to be a gay man. She did not believe that he had been ill-treated by his uncle or any other person. She was clear that the Appellant presented at the outset as facing no real risk in Namibia (paragraph 79).

27. Second, there is the question of the Respondent failing to follow her own policy document of "sexual identity issues in asylum claim." However, "whatever shortcomings there may or may not have been in this regard, they were cured by the judge's own detailed and careful assessment of the situation before her, where the Appellant was represented and where he gave evidence."

28. Third, it is suggested that he had requested an interpreter for his substantive interview and had not been provided with one. However, there is every indication that the interviewing officer was sensitive to this fact and in fact stated that, "a lot of questions have had to be repeated," and there is no suggestion here that the effect of so doing has in any way detracted from the Appellant not being able to make his case clear to the interviewing officer. It is inevitable that there are bound to be languages coming up before the authorities, such as the Ojitherero language, for which interpreters may well on occasions be difficult to find, and the main question is whether the authorities have conducted themselves in a reasonable and fair manner so as to ensure that anxious scrutiny has been exercised in enabling the Appellant to make his story known to the officials.

29. Mr Neville has argued that the judge himself did not find the Appellant's use of the English language to be so woefully inadequate that he was unable to tell his story. Mr Neville provides the explanation that the reason for this is to do with the fact that the Appellant had by the time of his asylum appeal before the judge, been in the UK for one year and three months, and had lived in Birmingham and in London, during which time he would have picked up on the English language.

30. However, this overlooks the fact that the judge found the Appellant to be intrinsically lacking in candour and to be an untruthful witness, and the Appellant's insistence on the use of an interpreter was not one that the

judge was, on the evidence before her, persuaded by. Indeed, the judge observed that,

> "I have found nothing in the course of the Appellant's evidence, and the numerous answers to questions which he gave in English, to indicate that the level of misunderstanding which is now claimed is down to his inability to follow questions or, indeed, give answers" (see paragraph 66).

31. Ultimately, it has to be borne in mind that the judge considered, on the lower standard of proof, to which the judge repeatedly draws attention in asylum claims such as this, to have been lacking in credibility. As she observed,

> "At no point in his interview, in which detailed answers to questions were recorded, does the Appellant indicate that he is no longer with his wife or, indeed that his documents are not as claimed or that he is not in the United Kingdom in order to take a short holiday ..." (see paragraph 68).

32. Accordingly, notwithstanding Mr Neville's attempt to persuade me otherwise, in his careful and well-measured submissions, there is no error of law in the original judge's determination.

Notice of Decision

There is no material error of law in the Immigration Judge's decision. The determination shall stand.

No anonymity order is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 10th February 2016