Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02605/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing On 18 July 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MAR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chelvan, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

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

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him or any member of his 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.

1. The appellant is a national of Bangladesh who claims to have been born in 1976. He entered this country with entry clearance as a Tier 4 (General) Student in June 2011 and was granted leave until August 2012. Prior to the expiry of that leave he made an application to remain in this country on the basis of his family and private life in the UK, which application was refused. He thereafter made a number of further applications and also brought judicial review proceedings. He was made the subject of reporting conditions but absconded.

2. Eventually, having been in this country unlawfully for some years and having avoided apprehension by the respondent, he was encountered working unlawfully in an Indian restaurant in January 2017. He was arrested and detained and then on 8 January 2017 he claimed asylum for a number of reasons, including claiming, it would seem for the first time, that he would be at risk on return to Bangladesh because he was a gay man. As the appellant was taken to Harmondsworth and placed in immigration custody, the investigating officers were obliged to have regard to the Home Office guidance as to how detained appeal cases should be dealt with. The guidance provided by the respondent "for deciding asylum claims in detention" states as follows:-

   > "Once an applicant is transferred to the relevant IRC, a DAC officer will conduct an induction interview within a day of their arrival. The purpose of the induction interview is to ascertain if the applicant needs assistance from a publically funded legal representative or if they have instructed a firm privately".

3. It is accepted on behalf of the respondent that the templates for this interview do not contain questions to demonstrate that this guidance has been complied with, and indeed it is the applicant's case in this appeal that the guidance was not in fact complied with and he was not at that stage (and on his case at any stage) informed of his right to at least seek to be represented under public funding (which would at some stage require him to satisfy both a means and merits test). Had the template interview contained questions which were consistent with the guidance, it might have been possible for the respondent to establish that he was in fact asked whether or not he wished to be assisted by a publicly funded legal representative, but in the event the respondent is unable to establish that the guidance was complied with. The nearest that the respondent can come to this is that in his asylum interview itself the question was asked "Name of legal representative/firm" to which the answer is written in ink "Applicant stated rep not attending". It is not clear from this whether that means that the applicant was saying that he was represented but that the rep was not attending, or whether he was not represented at all. The appellant's instructions to his Counsel

representing him today is that he had been represented privately the previous day with respect to an application for temporary release, which application had been funded by friends, but although the appellant may have had some representation at some time, it cannot be said on the basis of this answer that the respondent can establish he was ever told of his right to seek representation under a public funding certificate. The template for interviews ought to be consistent with the guidance and until such time as it is, difficulties like this might arise again because where it is said on behalf of an applicant that guidance has not been followed, it is important that where possible the respondent is able to show if this is the case (as it should be) that this allegation is not correct.

4. In the event, a decision was subsequently made rejecting the appellant's claim; there were inconsistencies within his case, including as to when he first appreciated that he was a gay man, which discrepancies (amounting to some years) are matters which need to be explained, but that is not a matter for this Tribunal today.

5. The appellant appealed against this decision and his appeal was heard by First-tier Tribunal Judge N M K Lawrence sitting at Harmondsworth on 4 April 2017. In a Decision and Reasons promulgated two weeks later he dismissed the appellant's appeal. The appellant now appeals, permission having been granted by First-tier Tribunal Judge C A Parker and the matter is before me.

6. In the course of his arguments on behalf of the appellant, Mr Chelvan stated that it was only 24 hours before this hearing that his instructing solicitors were provided with copies of the Home Office bundle and it was only at that stage that it became apparent that there was no evidence from the record of interviews held with the appellant that the respondent had in fact followed her guidance. Although many of the arguments made within the skeleton argument prepared on behalf of the appellant and within the grounds of appeal may lack obvious merit, this appeal, in my judgement, turns on one important issue, which is whether or not the judge made a procedural error by refusing to grant the appellant, who was representing himself, an adjournment in order first of all to give him time in which to seek further evidence (it should not be forgotten that he was in custody at the time), but more importantly, to enable him to seek legal representation.

7. I note, although this fact is not necessarily central to my decision, that the appellant is represented today under a public funding certificate and so clearly, at some stage, somebody must have considered that both the means and the merits tests were sufficiently satisfied that representation should be provided at public expense. Having considered carefully the decision made by Judge Lawrence, even though he makes a number of findings which had the appellant been represented would appear to be fully reasoned (the discrepancies in particular are large), nonetheless it does not appear that at any stage the appellant was asked during the hearing whether he had been advised of his right to seek public funding

for his representation. At paragraph 4 the judge states that the appellant has made no effort to trace potential witnesses "or instruct solicitors to trace them". He goes on to say that "In the light of these I find the adjournment would not serve the appellant intends (sic)". He then says that "As a consequence I refused the application to adjourn".

8. Although the judge gives what on their face appear sustainable reasons for disbelieving the appellant, in particular the inconsistencies in his evidence which had been referred to in the refusal letter, at the very least, if the appellant had been legally and competently represented, an attempt would have been made to clarify these inconsistencies if it was possible to do so; it does not appear that any such attempt was made during the course of this hearing. As the respondent cannot show that the appellant was ever advised of his right to seek public funding, the fact that so far this unrepresented appellant has not done all he might have done to prepare his case, carries rather less weight than it might have done.

9. This is, however weak, an asylum claim and one in which the appellant (with regard to another aspect of the claim) had some injuries which were not inconsistent with the claim that he was making. The judge at the very least, in my judgement, before rejecting the application for an adjournment ought to have made enquiries as to whether the appellant had ever been advised of his right to seek representation by means of public funding which, after all, was what the Home Office guidance says he ought to have been advised about. I find that the judge's failure even to enquire as to whether this guidance had been followed is a procedural error which is sufficiently serious as to amount to a material irregularity and for this reason (however weak his claim may arguably have been) the appellant was denied the opportunity of having a fair trial at which his case was properly put.

10. In these circumstances I must set aside Judge Lawrence's decision and the decision will have to be remade.

11. It is agreed in these circumstances on behalf of both parties that the appropriate course is that this appeal be remitted to Taylor House for rehearing by any judge other than First-tier Tribunal Judge N M K Lawrence and I so order.

Decision

I set aside the decision of First-tier Tribunal Judge N M K Lawrence and remit this appeal for rehearing at Taylor House by any judge other than Judge N M K Lawrence.

Signed:

Upper Tribunal Judge Craig Date: 25 July 2017