



(Immigration And Asylum Chamber)

Upper Tribunal
Appeal Number: PA/03230/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 24 July 2017

Decision and Reasons Promulgated
On: 2 August 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

K K
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms E Daykin, counsel (instructed by AH Solicitors)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of India, born on 5 April 1986. She appeals with permission against the decision of First-tier Tribunal Judge Anstis who dismissed her appeal against the respondent's decision refusing her application for asylum and humanitarian protection. The decision was promulgated on 14 February 2017.

The background to the First-tier Tribunal appeal

2. Judge Anstis noted that the appeal was originally listed for hearing on 9 September 2016. An application to adjourn that hearing was made two weeks prior to the scheduled date on the basis that the appellant had an impending operation. The appeal was accordingly adjourned and was re-listed for hearing on 6 February 2017 [6].
3. On 1 February 2017 there was a further application to adjourn the hearing on the basis of the appellant's health. It was asserted that the appellant had an oophorectomy operation on 26 August 2016. Over the last month she had a CT scan and stool test showing a recurrence of her right ovarian cyst and an abnormal stool

sample. She is experiencing constant abdominal pain and ongoing nausea and reflux symptoms which recently became worse. She has an endoscopy pre-assessment appointment on 14 February 2017. She was also referred to gynaecology to determine whether she needs a further operation.

4. In their covering letter requesting the adjournment, the appellant's solicitor's stated that she has 'confirmed' to them that she will be unable to attend the office in the run up to the hearing so that they can take instructions from her in order to prepare for the hearing, as she is "extremely unwell." She has also been distraught over the past few weeks in relation to her deteriorating health. They have spoken to their client on 1 February 2017 and she confirmed to them that she does not feel physically or mentally fit to attend her asylum appeal hearing. The request was therefore made to adjourn the hearing until April 2017 when she has fully recovered from the oophorectomy operation.
5. The Judge also referred to a letter from the appellant's GP, who stated that the appellant "tells me" that the abdominal pains are constant and become more severe at any time and long car journeys and travel tend to make her symptoms worse. She feels she is not in good health at the moment. He understands that she has an appeal hearing but does not feel well enough to attend it. These are ongoing symptoms, to take into consideration, and her appeal hearing should be postponed until the time her health improves.
6. Judge Anstis noted that the respondent's refusal letter recorded that the appellant failed to attend three asylum interviews scheduled during December 2015, January and February 2016 also on medical grounds before submitting a written statement for consideration in March 2016.
7. Judge Anstis recorded at [10] that the application made for an adjournment on 1 February 2017 was refused by the Judge, who commented "in strong terms" that he has read the case. "...On the papers it is weak - I decline to devote more Tribunal time to it. I am not persuaded the appellant is not trying to avoid having to put her case".
8. At the hearing on 6 February 2017, the appellant's counsel, (not Ms Daykin), renewed the application for an adjournment. He produced a hospital discharge note from 3 February 2017 showing that the appellant had self-referred to the hospital with chest pains, eventually being discharged for follow up to her GP.
9. Counsel stated that she was too unwell to attend the Tribunal hearing and too unwell to instruct her solicitors. It was contended that there were good reasons for her absence and the case could not be fairly and justly determined without her presence.
10. That application was opposed. The presenting officer was concerned that there appeared to be no time frame given for when the appellant could be expected to be well enough for the hearing and that potentially any adjournments could go on for a long time [13]. The appellant's Counsel acknowledged that this was a concern but stated that the appellant was to have an endoscopy in a week's time and that the case should be listed for a CMR.

11. Before deciding under the Rules whether an application for an adjournment should be granted, the Judge asked counsel what the appellant's attendance would add to the evidence that she had already submitted in her statement prepared for her asylum claim. He stated that his only instructions were what is in that statement; his instructing solicitors had not been able to give him any indication of what additional evidence the appellant might give if present at the hearing [15].
12. The Judge then considered whether fairness required that an adjournment be granted. He concluded that fairness did not require an adjournment and it was not appropriate to allow an adjournment. The appeal proceeded.
13. He had regard to the appellant's unsigned statement dated 2 March 2016 and also noted that there was no evidence from her husband despite there being no impediment to his attendance at the Tribunal, and despite the fact that he must have had first hand knowledge of at least some of the matters referred to in the appellant's statement [29]. At the hearing before the Upper Tribunal, Ms Daykin was not able to give any explanation or reason why her husband had not attended the hearing or given a statement in support.
14. Judge Anstis set out in some detail the appellant's immigration history set out in her statement where she described marrying her husband in January 2010 and the birth of their child in November 2010 [30].
15. He had regard to her description of her father as both influential and protective, and had not allowed her to go to school on her own. She first met her husband in 2002 and spent time talking to him at her school. Her father was then angry and 'banned her' from going to school, requiring her to stay at-home. She lost touch with her future husband who moved to the UK but she spoke to him on the phone [31]. She met her future husband soon after arriving in the UK.
16. The Judge noted that the refusal letter accepted the fact of the appellant's relationship with her husband but not that her father is influential or had an adverse interest in her. He noted that it is clear from the appellant's own evidence that she was permitted by her father to leave India and study in the UK. He accepted the point made in the refusal letter that this is inconsistent with what the appellant says about her father - at one point not even allowing her to go to the local school. It did not make sense that a father who was so controlling as not to allow her to attend school would then accept her studying in a foreign country [40].
17. The Judge stated that he would have expected much more information about the extent of the father's influence and how it had arisen. All there was in her statement was a general assertion that her father is influential. No details are given. This was not satisfactory - [42].
18. The Judge referred to (and accepted) country material 'suggesting' that internal relocation and/or sufficiency of protection would be available to the appellant on return to India [43].
19. He dismissed her appeal for asylum as well as under Article 8.
20. First-tier Tribunal Judge Osborne granted the appellant permission to appeal against the decision. The grounds in support asserted that the Judge erred in

refusing the appellant's application which prevented her from the benefit of a fair hearing.

21. Judge Osborne noted that whilst there was '.....otherwise a careful and well reasoned decision and reasons in which the Judge took account of the correct case law and correct legal principles' it was nonetheless arguable that the Judge erred in failing to adjourn and that justice should not only be done but should manifestly and undoubtedly be seen to be done.
22. Ms Daykin relied on the grounds of appeal drawn by the former counsel. She referred to the history giving rise to the adjournment. Although it is accepted that the Judge applied the correct test, fairness in this case necessitated that the appellant be granted an adjournment to ensure a fair hearing. The appellant should have been afforded a proper opportunity to prepare and prosecute her appeal, particularly as it was an asylum appeal. On account of her health difficulties, her representatives had not had the opportunity to take sufficient instructions from her to be able to prepare her appeal to advance it in her absence or to identify what further information and evidence might assist her in discharging the burden of proof upon her.
23. I inquired from Ms Daykin what, if anything, the appellant's representatives had done since the original adjournment in August 2016 and February 2017 to take instructions from the appellant to prepare her appeal. She frankly stated that she had not been given any information in that respect and was unable to assist. There was still no indication when the appellant would be able to participate in the appeal proceedings.
24. On behalf of the respondent, Mr Clarke submitted that the Judge has had proper regard to the underlying considerations under the 2014 Rules. There was in fact no evidence as to whether the appellant would ever be able to participate at a hearing. The GP's reference to adjournment "until her health improves" was singularly vague and unhelpful.
25. Nor had there been any evidence that the attendance at a hearing would affect her health. The Judge was aware of the overriding objective, and in particular the proportionality principles.
26. He submitted that fairness also requires certainty and completion. The appellant was not immobile. She was able to look after herself.

Assessment

27. Judge Anstis had proper regard to the President of the Upper Tribunal's decision in Nwagwe (Adjournment: Fairness) [2014] UKUT 00418 (IAC). The overriding objective was fairness. Delay must only be avoided so far as compatible with proper consideration of the issues and fairness is the supreme criterion [18].
28. He has set out in some detail the history of the appellant's failure to participate in the asylum process, including the fact that she did not attend the asylum interview on three occasions at the end of 2015 and at the beginning of 2016. Nor did she attend the hearing of her appeal listed in August 2016.

29. The Judge noted in the balance that it was desirable that an appellant should attend the hearing of her case in order to be able to give evidence. On the other hand, he took into account the overriding objective to seek to avoid delay and the public imperative for such important cases to be heard without inappropriate delay [20].
30. Nor was the Judge provided with anything to suggest that the appellant would add by her attendance anything to what was already in her statement [23]. Nor was it clear whether she would be in any better position to attend any resumed hearing than she had been in August 2016 or February 2017.
31. The Judge also noted that the appellant's husband did not attend the hearing and had not given any statement in support. Nor had any additional written evidence been served which required explanation by the appellant [19].
32. The Judge satisfied himself that counsel had no instructions or indication of what additional evidence the appellant might give if present at the hearing.
33. It is evident that between the adjournment in August 2016 and February 2017 there had been no preparation of the appellant's case. The solicitors have given no evidence or any explanation as to why the appeal could not have been further prepared, if required, during that lengthy period. There is no assertion that her medical condition prevented the holding of a conference, if required, for the preparation of any further witness statement.
34. The Judge found, having regard to the circumstances as a whole, that fairness did not require an adjournment in these circumstances.
35. It is not asserted in the grounds of appeal that the Judge's findings regarding the appellant's asylum claim as set out from paragraphs 39 onwards, were in any way flawed or unreasoned. Nor is there any appeal against any of the findings he made with regard to her Article 8 appeal.
36. The Judge has had regard to the circumstances as a whole. He has exercised his discretion judicially in finding that fairness did not require an adjournment in this case.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them 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 31 July 2017

Deputy Upper Tribunal Judge C R Mailer