Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11327/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	
On 28 April 2017	**On 13 June 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

KM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, Counsel instructed by Wimbledon Solicitors (Balham High Road)
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a vulnerable young man. It is accordingly appropriate to make an anonymity direction and I do so. 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 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.

2. This appeal has a confusing history which it is not necessary to set out in any detail. There have been earlier applications for asylum which have been refused but recently, on 8 February 2016, he made another application which was refused on 23 September 2016. It is right to record that in the latest refusal there were some issues raised which were or could reasonably be said to be new ones. It is right to recall that the respondent accepted that the fresh submissions which had been made did amount to a fresh claim and did not seek to reject them as not amounting to a fresh claim as she could have done pursuant to paragraph 353 of the Immigration Rules.

3. Following the dismissal of his most recent claim for asylum the appellant appealed and his appeal came before First-tier Tribunal Judge Maxwell sitting at Harmondsworth on 15 November 2016. In a Decision and Reasons promulgated on 5 December 2016 the appeal was dismissed. The appellant now appeals against that decision permission having been granted by Upper Tribunal Judge McWilliam on 3 March 2017. There is one ground of appeal and that is that the judge made a procedural error in not granting an adjournment to the appellant to allow his solicitors to obtain further evidence and in particular psychiatric evidence in support of his claim that he would be at risk on return.

4. As a preliminary issue, Mr Wilding properly sought to raise a matter which he said had been overlooked by Judge McWilliam when she had granted permission to appeal. The application made to the Upper Tribunal for permission to appeal against the decision of the First-tier Tribunal had been made two weeks out of time in accordance with the time limits set out within the Rules. An explanation had been given for the delay which had been before Judge McWilliam but she did not, when granting permission to appeal, deal specifically with the time point and so time was never extended. Mr Wilding submitted that in those circumstances, unless I myself granted an extension of time, the appeal should not be admitted. Having considered his submissions I extend time to allow proper consideration of the appeal. The reasons I do so can be set out succinctly. I of course have regard to the guidance given by the Court of Appeal in the well-known cases of *Hysaj* and also the more recent case of *SS (Congo)*. The delay was relatively slight and in my judgment there has been no prejudice to the respondent caused by this delay. Further, this is a case which as it appears from what I say below is one where the merits are in favour of the appellant. This is a protection claim and the consequences for the appellant of being returned if ultimately his case is well-founded could be severe and in the circumstances of this case I consider that it is very clearly in the interests of justice for time to be extended to allow his claim to be properly put.

5. There are a number of issues raised on behalf of the appellant but I need only deal with one. At paragraph 9 of his determination, Judge Maxwell wrote as follows:

> "Application to Adjourn the Hearing
>
> 9. The appellant, through his representative, applied to adjourn the hearing of his appeal. The principal basis of the application is set out in a letter from his representative dated 9 November 2016, a copy of which is enclosed in the appellant's bundle. In essence, the basis of the application was:
>
> ...
>
> (ii) In addition, it was suggested that it might be appropriate to obtain further medical evidence relating to the appellant's mental state; reference being made to the medical report and letter enclosed in the appellant's bundle."

6. In his original submissions, Mr Wilding stated that if that was a correct summary of the way in which the appellant's case had been put, it would have been perfectly reasonable for the judge to refuse the application, because the appellant would have had ample opportunity beforehand to obtain evidence and the possibility that the evidence might help was entirely speculative. He noted that it was not stated within the decision that the appellant's representative had said what evidence it was that they were seeking, which expert they were seeking to instruct, how long it would take and so on.

7. However, I have been shown the letter of 9 November, from which it is apparent that what is said at paragraph 9(ii) of the decision does not accurately set out what was contained within that letter. The relevant part of this letter, regarding the medical evidence it was hoped might be adduced, says as follows, at paragraph 2:

> "The appellant lived with his guardian uncle and aunt who physically and mentally abused him. Currently the appellant has been taken over [to] the YMCA. The social worker Ms Rabia evidenced that the appellant suffers from mental health problem and he has been referred to counselling sections at present. However he has not seen a psychiatrist or a clinical psychologist in the recent years. Therefore we have currently applied for extension of disbursements to instruct an independent psychiatrist in order to provide a detailed report with diagnosis. Physical and mental health has been deteriorated since he was beaten by his uncle...".

8. It is certainly not the case that it was said in this letter that it "might" [my emphasis] be appropriate to obtain further medical evidence relating to the appellant's mental state; what is said is that because of what has

happened to him since his earlier applications it was necessary to obtain such evidence.

9. As the judge later, at paragraph 12, referred to the lack of evidence of his mental health problems as being a factor which "significantly undermines the claim", it is hard to see how this evidence cannot be said to be relevant.

10. I have in mind, of course, what was said by the Court of Appeal in the judgment of Moses LJ in the well-known case of *SH (Afghanistan)* [2011] EWCA Civ 1284 at paragraph 8, as follows:

> "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.".

11. The consequences to the appellant if returned to Sri Lanka, if his case is accepted, is obviously life threatening, and clearly consideration of his claim must demand "the highest standards of fairness". That required the judge to understand fully the way in which his application for an adjournment was being put, which it does not appear from what is set out at paragraph 9(ii) had been the case. As Judge McWilliam stated when giving her reasons for granting permission to appeal:

> "It is arguable that the judge did not consider all material matters when deciding whether or not to grant an adjournment for a full psychiatric assessment e.g. the appellant's age, difficulties he had encountered whilst in foster care and the referral by his social worker for counselling."

Judge McWilliam also noted that:

> "Whilst he took into account the medical evidence that was before him, the judge accepted the evidence was woefully out of date."

Judge McWilliam noted also that:

> "The judge concluded that there was no purpose in adjourning because the appellant was not relying on Article 3 in the context [of] mental health which is arguably an erroneous approach, [and] the appellant's mental health is arguably material to the appellant's appeal on asylum and Article 8 grounds."

12. Accordingly, having considered very carefully the decision in light of the material which was in fact before Judge Maxwell, I find that at the very least Judge Maxwell failed to give adequate reasons for refusing the adjournment and this was a procedural error sufficiently serious to amount to a material error of law.

13. It follows that his decision must be set aside and it is accepted on behalf of both parties that the consequence is that the appeal should be remitted back to the First-tier Tribunal for reconsideration by any judge other than Judge Maxwell and that none of the findings made can properly be retained. I accordingly order as follows:

Notice of Decision

The decision of First-tier Tribunal Judge Maxwell is set aside as containing a material error of law. The appeal will be remitted to the First-tier Tribunal, sitting at Hatton Cross, to be heard by any judge other than Judge Maxwell.

Signed:

Upper Tribunal Judge Craig Dated: 9 June 2017