Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05774/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 January 2018	**On 26 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

[S M]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A. Adam, Counsel, instructed by Lupins Solicitors
For the Respondent: Mr S. Staunton Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

1. The appellant is a citizen of Bangladesh who was born on [ ] 1971. He appeals against the determination of First-tier Tribunal Judge R. Sullivan promulgated on 13 September 2017 following a hearing that took place at Harmondsworth on 18 August 2017.

2. There is one principal argument that is advanced on behalf of the appellant and that arises from the refusal of the Tribunal to adjourn the hearing in order to obtain the expert report of a country expert following a decision that had been made on 6 July 2017 to adjourn the hearing in order to facilitate the provision of that expert's report. It seems to me that

once a decision was made on 6 July 2017 that it was of use to the Tribunal for there to be expert evidence then that was the route by which the Tribunal itself had set. It was the trajectory to which all the parties were aiming and consequently, when the report was not ready on 18 August 2017 the issue before the judge was whether, having set out upon the original course of action to obtain an expert report, that it was right at that stage to abandon it altogether.

3. The application for an adjournment on 18 August had been prefigured by an application that had been earlier made by which time it was clear that the expert report was not going to be available on 11 August 2017, an earlier deadline. Accordingly the Tribunal was in the difficulty that there was an acknowledged need for an expert report. Without any fault on the part of the appellant, the report was not ready, although it appears that the report was very much on the point of being ready. It was said that it would have been ready on 18 August, the day of the hearing, but it did not actually arrive on that date.

4. I do not think anything can be judged by the date of the report that we have now seen, that is, a report dated December. The reason for the further delay was that, once the appeal failed, the solicitors naturally told the expert that he should no longer continue his work. Accordingly, it was only when permission to appeal was granted, that renewed efforts were made to instruct and obtain the report.

5. The issue of whether an adjournment should be granted in order to obtain an expert report is determined on the basis of fairness. The authority for that is the decision of the Upper Tribunal in *Nwaigwe (adjournment: fairness)* [2014] UKUT 418, a decision of Mr Justice McCloskey. He said:

> "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."

6. In reaching that conclusion the judge relied upon the decision of the Court of Appeal in *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 where at paragraph 13 the court said:

> "First, when considering whether the Immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was *Wednesbury* unreasonable or perverse. The test and sole test was whether it was unfair."

7. In a case such as this, where a judge will have prepared a hearing, where he will have made a provisional view as to the way the case is going to be conducted, it is deeply frustrating to be told that the expert has not prepared a report but, given that the trajectory, as I have called it in these proceedings, was along the lines that a report was to be prepared and was

being prepared, it seems to me that fairness required that report to be provided.

8. It may be that a better course of action when reports are directed is that the solicitors obtaining the report are directed in terms that they must not enter into a contract for the preparation of the report unless they impose a contractual obligation upon the writer of the report to meet a set deadline and that, unless the report maker is prepared to give that undertaking, the instructions will not follow. If a direction is made to that effect then it seems to me that it is likely to be entirely fair for the judge, on finding that the report is not available on the due date, to say that it is fair to proceed but, even then, it would be open to the expert to say why he was not able to perform his contractual obligation. He may have been admitted to hospital. He may have been required to attend a hearing which lasted many days. He may have had other commitments which came surprisingly and which he could not avoid. So the door is not entirely shut but it does seem to me that it would make it very much more difficult for an expert merely not to produce the goods at the due date.

9. There has been an explanation that was provided but I am by no means certain that the explanation was as good as it might have been.

10. However, there is also a factor to which I am minded to attach greater weight. We now have the report. That report will not go away. Someone has to give consideration to it at some stage. If it is treated as a paragraph 353 fresh claim then the Secretary of State has to give a notional consideration, a theoretical consideration, of what a First-tier Tribunal Judge would do with that report were he applying anxious scrutiny when looking at it. Furthermore, if the Secretary of State refuses to treat it as a paragraph 353 fresh claim, once again, the Upper Tribunal on proceedings for a judicial review, would have to go through the same hypothetical consideration of this report and see its likely effect.

11. I have to say that, having found there is an error of law, I am heartened by the fact that it will be unnecessary to consider as a hypothetical exercise what a First-tier Tribunal Judge might do in relation to this report. If the matter goes forward to be remitted to the First-tier Tribunal it will not be a hypothetical consideration of the report but it will be an actual consideration of the report. I am bound to say I consider that very much more satisfactory.

12. I say nothing about the findings that are made by the First-tier Tribunal Judge. Those will obviously have to be reconsidered by the judge who hears the appeal afresh. All I will say is that the groundwork as to issues that have been raised have already been laid out and it will be for the parties to consider whether those have been adequately responded to.

13. Once again, the First-tier Tribunal determination, whilst it is not a starting point, may have matters which are sensible and which may not have to be argued over again. It may also have matters which the judge on the

second occasion will consider do not assist him, in which case it is entirely appropriate that he rejects that method of thinking. It will, however, require a wholesale re-making of the decision on the basis of making fresh findings of fact, assisted hopefully by the report that has been prepared.

14. The appellant is at liberty to adduce expert evidence of his choice at the re-making of the decision but such expert evidence must, out of fairness, be provided at least seven days before the resumed hearing.

15. I set aside the decision of the First-tier Tribunal and direct that the decision is to be re-made in the First-tier Tribunal and the appeal is remitted for that to take place.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
5 March 2018