



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: PA/04153/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 January 2020**

**Decision & Reasons Promulgated  
On 29 January 2020**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN  
-and-  
UPPER TRIBUNAL JUDGE FINCH**

**Between**

**M. B.  
(ANONYMITY ORDER MAINTAINED)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Ms K. Tobin of counsel, instructed by Malik & Malik Solicitors  
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Respondent is a national of Afghanistan. He initially arrived in the United Kingdom on 21 July 2011 but was removed back to France on two occasions. He arrived in the United Kingdom on 5 March 2015 for a third time, but his claim was subsequently deemed to have

been withdrawn. He made further submissions on 4 February 2019 but his claim for asylum was refused on 3 April 2019. At no point had the Respondent conducted a substantive asylum interview with the Appellant.

2. He appealed against this decision, but his appeal was dismissed by First-tier Tribunal Judge Howard in a decision promulgated on 25 October 2019.
3. The Appellant appealed against this decision and on 5 December 2019 First-tier Tribunal Judge O'Brien granted him permission to appeal.

#### **ERROR OF LAW HEARING**

4. Counsel for the Appellant and the Home Office Presenting Officer both made oral submissions and we have referred to them below, where relevant.

#### **ERROR OF LAW DECISION**

5. Permission to appeal was primarily granted on the basis that First-tier Tribunal Judge Howard had erred in law when he failed to grant the Appellant an adjournment so that Dr Cutting, a consultant psychiatrist, could answer an additional question that arose from his expert report, dated 2 August 2019. In this report, he had concluded that the Appellant was suffering from depression with a psychotic episode.
6. There was a copy of a letter from the Appellant's solicitors, dated 14 August 2019, in the Tribunal's file. It showed that it was emailed to the Tribunal on 16.48 that day and was recorded as having been received on 15 August 2019. The solicitors also attached email correspondence between them and Dr Cutting, dated 8 August 2019, in which they asked him to amend his report to respond to this further question, which was whether, in his opinion, the Appellant had the capacity to give evidence in court taking into account his poor memory. In a further email, dated 13 August 2019, they also asked whether he had the capacity to give evidence. On 14 August 2019 Dr Cutting's office confirmed that he had been away for a few days and was coming home either that day or the day after and provided them with his home telephone number. It was as a result of this email correspondence that the Appellant's solicitors applied for a short adjournment.
7. The Appellant's counsel's skeleton argument repeated the application for an adjournment and explained that the expert report was yet to be formally filed, as it was thought to be

incomplete and that it may include factual inaccuracies. The First-tier Tribunal's record of proceedings does not refer to the written and oral applications for an adjournment, but the Home Office Presenting Officer confirmed that the Respondent's record of proceedings noted that an adjournment had been requested.

8. First-tier Tribunal Judge Howard also failed to mention the application for an adjournment in his decision or provide any reasons for refusing the Appellant's application for an adjournment.
9. In paragraph 23 of his decision, he did briefly refer to Presidential Guidance Note 2 of 2010 on *Child, vulnerable adult and sensitive appellant guidance* and reminded himself that the Appellant's mental ill-health may render him a vulnerable adult. However, he failed to take into account the fact that paragraph 5.1 (viii) of the Guidance advises a judge to "consider whether expert evidence e.g. as to disability, age or mental health is required, particularly if there is a dispute or an issue over ability to participate in the proceedings; consider whether an adjournment would be appropriate to enable either party to obtain reports".
10. He also failed to take into account the guidance provided in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) where the Upper Tribunal found that:

"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284".
11. In the Appellant's case, the existing expert report suggested that his poor memory may prevent him from giving cogent oral evidence. This was arguably made a more significant factor by the fact that, as he had not been given the opportunity to give an account of his

claimed history of persecution in an asylum interview, this was the first time that he would have the opportunity to answer questions about his account.

12. In addition, it was clear from the decision that the Appellant had had difficulty replying to questions put to him. For example, at paragraph 25, First-tier Tribunal Judge Howard noted “...He was asked what [sic] not after the first or second visits given to the family history with the Taliban. He could give no credible answer. He was asked why they would want him to join them given they had killed his brother and father. Again, he could give no reason”. It was also the case that in paragraph 23 of his decision, First-tier Tribunal Judge Howard noted that “the case turns entirely on [the Appellant’s] credibility as a witness”.
13. Furthermore, a previous application for an adjournment in order to obtain an expert psychiatric report had been granted in recognition that the Appellant’s mental ill-health may be a factor to be taken into account at any appeal hearing and the Appellant was only asking for a very short adjournment to ensure that all relevant psychiatric evidence was before the First-tier Tribunal.
14. For all of these reasons, we find that the failure to grant an adjournment and the failure to provide any reasons for refusing such an adjournment amounted to errors of law.
15. In paragraphs 32 and 39 of his decision, First-tier Tribunal Judge Howard found that the Appellant would be able to obtain the medication for his depression in Baghlan and would be living with his family there. However, when reaching this conclusion, the Judge failed to take into account the evidence contained in the August 2018 report *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* which indicated that, in general, those suffering from mental disabilities had limited access to adequate health care in Afghanistan. This report had been referred to by the Appellant’s counsel in paragraph 20 of her skeleton argument and it was also contained in the Appellant’s Appeal Bundle.
16. In addition, in the CPIN, dated August 2019, entitled *Afghanistan: security and humanitarian situation* the Respondent had confirmed that the quality of health services in Afghanistan remained poor.
17. For these reasons we also find that there were errors of law in First-tier Tribunal Howard’s decision.

## **DECISION**

- (1) The Appellant's appeal is allowed.
- (2) First-tier Tribunal Judge Howard's decision is set aside in its entirety.
- (3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judges Howard and O'Brien.

Signed

Date 17 January 2020

**Nadine Finch**  
Upper Tribunal Judge Finch