Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01214/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2018	**On 23 February 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

Cristina Ndona
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr G Brown, instructed by CAB (Bolton)
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Durance promulgated 25.8.17, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 19.1.16, to reject her protection claim.

2. First-tier Tribunal Judge Osborne granted permission to appeal on 16.1.17.

3. Thus the matter came before me on 16.2.18 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision should be set aside.

5. After hearing the submissions of the two representatives I reserved my decision, which I now make.

6. The single ground of appeal alleges procedural irregularity leading to unfairness in the making of the decision of the First-tier Tribunal. This requires a consideration of the chronology and the events on the day of the First-tier Tribunal appeal hearing on 10.8.17.

7. The appellant, a citizen of Angola, first came to the UK on a visit visa in March 2015. She did not claim asylum until July 2015, which was made on the basis of a risk of persecution on religious grounds, being a member of the Seventh Day Adventist Church known as Luz de Mundo, which it is claimed is perceived as anti-government. She also claimed asylum on grounds of imputed political opinion arising from her relationship to her partner JP, said to be a pastor of the Church in Huambo, who had informed her by telephone on 3.5.15 that the authorities had destroyed the church and are looking for her. She has had no contact with him since then and does not know where he is.

8. The application was refused in the decision of the Secretary of State (RFR) of 19.1.16.

9. The appeal was first heard in the First-tier Tribunal before Judge Wellesley-Cole in August 2016. The appellant did not attend the appeal hearing and it proceeded in her absence. After the judge concluded the hearing, a message was received from the Citizens Advice Bureau in Bolton, which had only been instructed only shortly before the hearing, requesting an adjournment. The judge considered the request was too late and proceeded to decide the appeal. In the decision promulgated 13.9.16 the protection claim was dismissed on all grounds.

10. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Ford on 5.10.16, on the basis of information received that the appellant may have been misinformed as to the date of the hearing, so that proceeding in her absence was arguably unfair and in error of law.

11. In her decision of December 2016, Upper Tribunal Judge Bruce agreed with the view of Judge Ford and set the decision aside, remitting it to be heard afresh in the First-tier Tribunal.

12. It was against that background that the appeal came before Judge Durance on 10.8.17.

13. At the outset of the First-tier Tribunal appeal hearing, Judge Durance was informed by Mr Brown, who then and now acted for the appellant, that the

appellant had disclosed to him that she had left a document at home which she had never previously disclosed to either her legal representatives or the Home Office. The indicates were that it was a warrant of some description, which she had allegedly received in 2016.

14. At [5] of the decision, Judge Durance noted that the issue of documents had been raised both within the screening interview and the substantive interview, both taking place in 2015. The judge considered that the appellant had had more than ample time to disclose the document or its existence and refused Mr Brown's application to adjourn. In doing so, at [7] the judge noted that there was no good reason advanced for the failure of the appellant to produce the document between her 2015 interviews and the hearing of the appeal in August 2017, despite the fact that she has had legal representation at all material times.

15. In oral evidence, the appellant said that she had stated back in November 2015 that she was to receive a document the following week, which was a warrant for her arrest, confirming that the Angolan authorities were looking for her. She maintained that she had received the document sometime in 2016 but could not recall the exact date. She also said she forgot to notify her solicitors about it and that she had left it at home. Asked why she had not provided this document earlier, given that she was told at interview to submit any such document along with a translation, she said she forgot to mention it to her solicitor.

16. Judge Durance invited Mr Brown to ask the appellant in evidence about her rebuttal statement which addressed the RFR, and which RFR raised the issue of documentation, by stating, "You have not submitted any documents in relation to your claim." According to [9] of the decision, a problem then arose because the statement made reference to RFR paragraph numbers when the RFR in the respondent's bundle has no such paragraph numbering. The judge explained that he stood the matter down so that enquiries could be made with the appellant's solicitors about the RFR numbering and the rebuttal statement. The judge also told the appellant that he would release her until 2pm, in order that she could retrieve the document from home. In the meantime, the judge dealt with a different case in his list.

17. When the appeal hearing resumed at 2.35pm, the document in question was produced by the appellant. The 'original' has been retained on the court file. It is evidently in Portuguese and headed 'Mandado De Captura,' the meaning of which would not be surprising if were arrest warrant. Mr Brown sought an adjournment of the appeal, now part-heard, in order to obtain a translation of the document. The judge noted that the envelope in which the document was handed up indicated that it had been received by the appellant on 14.7.16.

18. Mr Brown's argument was that the appellant's case was that this untranslated document was an arrest warrant and indicated that she was wanted alongside her husband. The appellant confirmed that she

understood Portuguese and indicated that she would be sent to prison on return. Mr Brown submitted that it would be wrong to speculate as to the contents of the document, but that it may be vital to the appellant's case.

19. Judge Durance considered the adjournment request and the guidance in Ex Parte Marin [1994] Imm AR 172, but refused the application, noting the following relevant factors, reformatted by me a little differently:

(a) The appellant had been interviewed on two separate occasions in 2015 and specifically questioned about documentation (AIR 2-7, & 93). She said that she would produce a document to show that they were searching for her in Angola, stating that a 'relative' would send it to her through DHL, and that she would receive it the following week, which would have been late November 2015. At that point she was advised to submit the document to the Home Office with a UK certified translation, within 10 working days. At Q93 she was asked how and when she found out that this document existed, to which she replied that she knew of its existence when she went to Croydon (for the screening interview) and was told that they needed that document;

(b) The RFR pointed out that she had not produced any documents in relation to her protection claim;

(c) The appellant had received the RFR as long ago as January 2016 and her representatives had prepared a rebuttal statement going through the RFR paragraph by paragraph, and, despite that process and that statement, she at no time disclosed to her representatives that she had the document she referred to in her interview and was expecting to receive. One might well find this omission astonishing, if not incredible;

(d) That whilst the Tribunal had to take into account the interests of fairness, it also had to take into account the efficient dispatch of court business and that fairness related to both fairness to the appellant and to the respondent;

(e) That the overriding objective of the Tribunal as set out in the Tribunal Procedure Rules is allied to issues of cost and delay, not only in relation to the present appeal but to other individuals awaiting their appeal hearings. If the proceedings were to be adjourned, another person's appeal would also be delayed in due course. That also impedes the respondent's function to maintain immigration control;

(f) There was no indication of poor legal representation, the representatives having diligently prepared a RFR rebuttal statement for the appellant. Addressing the RFR paragraph by paragraph. Again, it would be very surprising if the issue of any documentation in support, and specifically that which the appellant referred to in her substantive asylum interview, had not been canvassed;

(g) That to all intents and purposes, the appellant was the architect of her own misfortune, and could blame no one other than herself, so

that any issue of fairness arose solely from the failings of the appellant;

(h) That the appellant had had 12 months to act on the RFR and considering Ladd v Marshall, there was no reason why with reasonable diligence this document could not have been served on the respondent and the Tribunal at an earlier date.

20. Although the judge refused the adjournment, further complaint is made that he proceeded to admit the document "to be considered holistically alongside the appellant's evidence." In due, course, applying Tanveer Ahmed and the duty to consider the reliability of the evidence in the context of the whole, the judge found that little weight could be given to the arrest warrant document.

21. The judge went on at [37] to note that whilst the appellant's case was that the arrest warrant was addressed to both herself and her partner, on its face his name is not referenced anywhere. In re-examination, Mr Brown asked the appellant further about the document, asking her to identify on the document where JP was named. At that point she admitted that his name did not appear on it.

22. The judge further took into account that if the document was as important to the appellant's case as claimed, she would have been able to adequately describe what it set out. The judge noted that she was unable to explain the reference to '8 annos' which appears in the document. Mr Brown submitted that it would be wrong to speculate as to the contents, but the judge observed that even without any translation, it was obvious that her evidence as to its contents was lacking and unsatisfactory. In effect, the judge found it not credible that she had not taken the time and effort to know its contents, understanding Portuguese as she admitted. The judge found that this apparent absence of curiosity undermined the credibility of her claim.

23. The appeal was dismissed for the reasons set out in the decision of the First-tier Tribunal, which need not be set out here in any further detail. The appellant sought and was granted permission to appeal to the Upper Tribunal.

24. The grounds submit that even though the appellant was at fault in not bringing the documents to the attention of her representatives earlier, and even though invaluable court time and public expense might have been incurred as a result of her delay, the judge should have applied the test of fairness, balancing those considerations against the potential risk to the appellant's life on return to Angola, and granted an adjournment for translation of the document.

25. Reliance is placed on Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), in which the Upper Tribunal cited the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]: "*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 fair."

26. In granting permission on 16.1.17, Judge Osborne considered it 'patently arguable' that having provided the appellant the opportunity to obtain the said documents, the judge arguably should have adjourned to enable them to be translated and the best possible evidence to be placed before the Tribunal. "It is difficult to understand how untranslated documents can be considered holistically if their contents cannot be understood."

27. In the light of the above history and for the reasons stated herein, I am not satisfied that there was any procedural unfairness in refusing the adjournments sought, either that at the outset of the hearing, so that the appellant could retrieve the document, or after its production, for a translation.

28. The 2014 Procedure Rules Rule 4(3)(h) empowers the Tribunal to adjourn a hearing. Rule 2 sets out the overriding objectives under the Rules which the Tribunal "must seek to give effect to" when exercising any power under the Rules. It follows that they are the issues to be considered on an adjournment application as well. The overriding objective is deal with cases fairly and justly. This is defined as including "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; (e) avoiding delay so far as compatible with proper consideration of the issues".

29. The Upper Tribunal held in Nwaigwe 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 First-tier Tribunal 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?

30. The appellant had stated back in 2015 that she was expecting a document that would show that the authorities were looking for her. Clearly, she was alive to its alleged importance in the consideration of her asylum claim. The importance of producing the document to the Home Office as soon as possible was also impressed on her in interview, on more than one

occasion. Even though, apparently, it was not received until July 2016, and thus after the date of the RFR, in the circumstances of this case the importance of raising it with her legal representatives cannot have escaped her. No or no adequate reason was given to Judge Durance for not doing so, and significantly, no reason has been advanced to me. Neither has there been any satisfactory explanation for not even mentioning it to her legal representatives when they were preparing the detailed paragraph by paragraph response to the RFR, which itself pointed out she had submitted no documentation. The appellant had ample and every opportunity to produce the document and for it to be translated. She had it for more than 12 months before the appeal hearing was listed in the First-tier Tribunal. Whilst the document may have been important to the appellant's case, in the context of this history fairness does not demand that the appeal be adjourned to remedy her abject and utterly unexplained and lengthy failure to produce and delay in producing the document at an earlier stage so as to enable it to be presented in an acceptable format in support of her case.

31. In the circumstances, I find no unfairness to the appellant in refusing the first adjournment request.

32. As it happens, having refused the first adjournment request, the judge took the opportunity arising from a break in the hearing to allow the appellant to retrieve the document from home. Mr Brown suggested that by doing this the judge tested the existence of the document, and that it was in fact produced supported the appellant's credibility. I am not satisfied that this was a 'test of its existence;' it simply highlighted the flexibility of the judge's approach at that stage, since in practical terms to allow her to do so presented no unnecessary delay to the proceedings. It follows that there can be no unfairness in the first refusal to grant an adjournment.

33. When finally produced at the hearing the document was untranslated. Nevertheless, the judge decided to admit it and treat it holistically, in other words to assess it in the context of the evidence as a whole, dealing with it as best he could and giving such weight as appropriate to an untranslated document.

34. For the same reasons as highlighted by Judge Durance and considered in some detail above, I also find no unfairness to the appellant in refusing an adjournment for translation at this later stage. In reality, the case for an adjournment at this second stage was little, if any, stronger than it was at the outset of the hearing when there was no document before the Tribunal. The same issues of fairness apply.

35. Whilst the document was potentially important to the appellant's case and the risk of prejudice potentially significant, there were other competing considerations. Fairness has to be considered in respect of both parties, not just the appellant. There was some (limited) prejudice to the respondent in that delay would be occasioned in dealing with the case

efficiently and in good time. An adjournment would also have disrupted the work of the Tribunal. The interests of justice generally lay in the efficient resolution of appeals and court business. Judge Durance referenced the delay to other appellants' appeals if this case were to be adjourned and had to be relisted. Finally, and more significantly the appellant was entirely and personally responsible for creating the difficulty which led to the adjournment application. If the appellant was disadvantaged, she was the author of her own misfortune. The Tribunal is not obliged to offer an indefinite, open-ended opportunity for an appellant to continue to prepare, revise or improve her case, whether by the production of further documents or adjourning to obtain a translation of a document she has had in her possession for more than 12 months and never once bothered to mention to her legal representatives, even when they were preparing her detailed response to the RFR.

36. I am satisfied that the decision to refuse the adjournment was not only properly open to the judge, but that on the facts of this case refusal of the adjournment was entirely fair to the appellant. She had been given a fair opportunity to prepare her case for the appeal hearing, repeatedly warned and advised to produce all relevant documentation, and had every opportunity to produce that documentation to the Tribunal in any acceptable format at what must have been several different stages of the preparation of the case for appeal. She had ample time to draw the documentary material to the attention of her legal representatives and for them to advise her, take it into account in preparing her RFR rebuttal statement, and to serve it and otherwise act upon it appropriately. The failure to produce this document with a translation was entirely her responsibility and a matter entirely and knowingly within her own control; she has no one else but herself to blame. There remains no or not satisfactory explanation for her failure to produce this evidence earlier.

37. Asking the important (rhetorical) question whether the refusal of the adjournment for a translation of the alleged arrest warrant was fair to the appellant, on the facts of this case and for the reasons set out herein, I find that the answer must be that it was fair, even if potential prejudice arises. I am satisfied that the appellant was afforded a fair hearing of her protection claim appeal.

38. In reaching this conclusion I have taken into account that in his submissions to me, Mr Brown made a related additional argument to the effect that the judge was also in error in admitting and considering the document whilst not granting at the same time the opportunity for it to be translated. I do not accept that it was unfair or improper for the judge to admit the document in its untranslated state. Had the appellant simply produced the document from her pocket and without warning during her evidence, it would have been admitted in the same way as it would have done if it had been an untranslated document in the appellant's bundle, in the context of the evidence as a whole. Such is by no means unique in the experience of the Tribunal. It is not the Tribunal's responsibility to obtain a translation, or to refuse admission if no translation is present. The judge

properly considered the reliability and the weight to be given to the document, applying Tanveer Ahmed principles. That included the evidence of the appellant as to the contents of the untranslated document, but nevertheless in a language which she told the Tribunal she understood. The judge was entitled to take into account in assessing weight and reliability that the appellant had asserted that the document was addressed to both her and her partner, but in reply to Mr Brown's own question admitted that his name did not appear anywhere on it. There was no error in taking that information into account, as well as the apparent lack of awareness, knowledge or curiosity as to the contents of the document. The reference to what '8 annos' meant, or comments about the language of the document being in a familiar script, were not material to the weight or reliability of the document, or the outcome of the appeal and I do not accept that the judge engaged in speculation. The fact remains that the appellant's assertions as to what the document stated was not supported by the appellant's own evidence as to its contents, which served to undermine its reliability even further.

39. I am satisfied that the judge of the First-tier Tribunal deal with the matter carefully and appropriately and that the decisions to refuse the adjournments and to address the limited weight and reliability of such an untranslated document do not disclose unfairness to the appellant or any other material error of law.

Decision

40. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands, and the appeal remains dismissed on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated