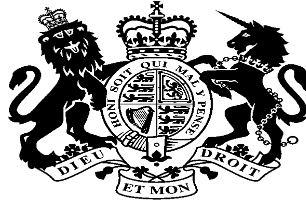

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11746/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 18 April 2018 **On 19 April 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MA
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Jacquiss, Counsel
For the respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

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Introduction and background

1. The appellant is a citizen of Pakistan. He entered the UK in 2002 as a visitor and has overstayed since then.

2. The appellant sustained strokes in 2009 and 2014 and according to a letter from a GP, Dr Subramony, dated 5 December 2017 since the stroke[s] he has been having "*weakness in the face, arm and legs [and]…has also sudden confusion; he finds it difficulty understanding speech with lack of coordination.*" He resides at the Edwardian care home, paid for by the local authority, Luton Borough Council ('LBC'). The manager of the care home described the appellant as having limited mobility with severe pain in his right shoulder, and requiring assistance with all personal care, in a letter dated 5 December 2017. In an undated assessment carried out by LBC the appellant's physical impairment and current health status were both described as "*severe*".

3. On 26 February 2016 the appellant applied for asylum. The screening interview took place that same day at the care home. The appellant briefly explained that he feared persecution in Pakistan because of an affair that he had in Pakistan, in 1975. The asylum claim was refused on 26 October 2017 because the respondent considered the claim to be vague, of considerable vintage and unsupported by any evidence, notwithstanding close family members in Pakistan and the UK.

Appeal proceedings

4. The appellant appealed against this decision to the First-tier Tribunal and a hearing took place at Birmingham on 13 December 2017. The appellant did not attend that hearing and relied upon evidence to support his claim that he was unable to do so. First-tier Tribunal Judge Andrew refused an adjournment application and dismissed the appeal on protection and human rights grounds. She wholly rejected the appellant's account.

5. First-tier Tribunal Judge Shimmin granted permission to appeal on a limited basis in a decision dated 24 January 2018. Permission was not granted in relation to the appellant's claim that his removal would breach Articles 3 and 8 of the ECHR for reasons relating to the medical evidence. Judge Shimmin however regarded it as arguable that in the absence of a substantive asylum interview the First-tier Tribunal erred in failing to adjourn the appeal to enable the appellant to give oral evidence.

Hearing

6. Ms Jaquiss relied upon the grounds of appeal and invited me to allow the appeal by remitting it to the First-tier Tribunal. Ms Aboni submitted that the

First-tier Tribunal was entitled to refuse the adjournment for the reasons provided.

7. After hearing from both representatives, I reserved my decision.

Error of law discussion

8. I begin this decision by considering the medical evidence that I have already summarised above. That evidence is sufficient to satisfy me that the appellant is vulnerable and should be treated as such, in accordance with the Joint Presidential Guidance Note No 2 of 2010 ('the Guidance').

9. In AM (Afghanistan) v SSHD [2017] EWCA Civ 1123, Sir Ernest Ryder, the Senior President of Tribunals, Ryder LJ said this (my emphasis):

> "30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.
>
> 31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:
>
> a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
>
> b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);
>
> c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
>
> d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
>
> e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

10. At [33] Ryder LJ observed that the emphasis on the determination of credibility in an asylum appeal is such that there is particular force in the Guidance at [13] to [15], which states as follows:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
>
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which by mental, psychological or emotional trauma or disability; the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. <u>The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it</u> and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

11. The same medical evidence was available to the First-tier Tribunal, yet it has given no consideration whatsoever to the Guidance or <u>AM</u>. The decision refusing an adjournment in order for the appellant to appear by videolink or telephone was also made without the benefit of the Guidance. I am satisfied that in refusing to grant an adjournment the First-tier Tribunal has acted unfairly for this reason combined with the additional reasons I set out below.

12. First, the First-tier Tribunal has not adequately addressed the medical evidence relied upon. The GP's letter is criticised because it is silent as to when the GP last saw the appellant and therefore questions how up to date the evidence is. This fails to take into account that the GP attached a list of the medication the appellant is on. This is taken from a printout dated 7 December 2017. When this is read together with the letter, it is sufficiently clear that the GP was making a current assessment of the appellant.

13. Second, the First-tier Tribunal has not considered the medical evidence against an important aspect of the relevant background. The respondent took the unusual step of conducting the screening interview at the care home. In the decision letter at [16], the respondent "*noted that due to your current medical prognosis you are not fit to travel for an interview…and as such you have been able to provide a written statement in support of your claim*". This gives the clear impression that the respondent accepted the appellant was unable to travel to be interviewed, at the time of writing. This appears to have been accepted by

Judge Andrews at [14] because she was satisfied that paragraph 339NA(vii) applies. 339NA states as follows:

> "**Personal interview**
> 339NA. Before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on their application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview.
> The personal interview may be omitted where:
> …
> (vii) it is not reasonably practicable, in particular where the Secretary of State is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond their control; or
> …
> The omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application.
> Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information."

14. The First-tier Tribunal has therefore accepted it was not reasonably practicable for the appellant to be interviewed substantively, given the respondent's opinion that the appellant was unfit or unable to be interviewed owing to enduring circumstances beyond his control. His medical condition and circumstances remained the same for the purposes of the hearing. It is very difficult to see from the limited reasoning provided, how the First-tier Tribunal could be satisfied that 339NA(vii) was met but not satisfied that the appellant was unfit or unable to attend the hearing.

15. Finally, the First-tier Tribunal has not considered whether it could fairly proceed without giving the appellant a further opportunity to provide relevant details or address the respondent's concerns. The headnote in Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC) states as follows:

> *"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."

16. I am satisfied that the appellant was deprived of a fair hearing because the First-tier Tribunal failed to consider the appellant's vulnerability and the impact this played on the lack of detail in his claim and the absence of a clear explanation for the delay in making the asylum claim. The First-tier Tribunal

also failed to resolve the inconsistency in the finding that 339NA(vii) was met and its other findings as to fitness to attend the hearing.

Disposal

17. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the error of law and the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. This is because completely fresh findings of fact are necessary.

18. I note that permission was restricted to the asylum grounds only. However the failure to adjourn and / or apply the Guidance has resulted in an unfair hearing, and in all the circumstances the interests of justice require that the decision on all grounds, asylum and human rights, should be set aside and remade de novo.

19. In order for the appellant's vulnerability to be taken into account fully with a view to making the necessary adjustments for a fair hearing, a case management hearing in the First-tier Tribunal would assist. It would also assist if the appellant's solicitors could set out precisely what steps it suggests would ensure a fair hearing in advance of the case management hearing, and in any event as soon as possible, by reference to updated medical evidence.

Decision

20. The decision of the First-tier Tribunal involved the making of an error of law. Its decision cannot stand and is set aside.

21. The appeal shall be remade by the First-tier Tribunal de novo.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
18 April 2018