Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09811/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 November 2014	**On 24 November 2014**

Before

Deputy Upper Tribunal Judge Pickup

Between

Gan Nesar
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: The appellant's cousin Mr Jon Mohammed Shahabi
For the respondent: Mr S Kandola, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Gan Nesar, date of birth 1.1.67, is a citizen of Afghanistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Lobo, who dismissed his appeal against the decision of the respondent, dated 2.10.13, to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 19.6.14.

3. First-tier Tribunal Judge Kelly refused permission to appeal on 28.7.14. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Goldstein granted permission to appeal on 15.10.14.

4. Thus the matter came before me on 21.11.14 as an appeal in the Upper Tribunal.

Error of Law

5. 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 determination of Judge Lobo should be set aside.

6. This is a peculiar case. Although the appellant was represented before the First-tier Tribunal, he is no longer represented except by his cousin, Mr Shahabi. I note from §2 of the determination that the appellant failed to comply with the asylum claim process. He entered the UK in 2002 but absconded on 31.7.03. He failed to attend an asylum interview arranged for 8.8.08. He claimed that he never received the notice of decision and subsequently made a fresh claim on 2.10.13.

7. Quite how the appellant came to make that fresh claim is something of a mystery. According to Mr Shahabi, the appellant has not spoken or opened his eyes for some 11 years. The papers before me contain a number of witness statements, but one for the appellant dated 27.2.14. It is not signed and I do not know how he could have made this statement. As I understand it, Mr Shahabi purports to speak for the appellant. How he can do that when the appellant has not spoken, even to Mr Shahabi for 11 years is rather puzzling and ultimately not very credible. At §19 of the witness statement it is claimed on the appellant's behalf, and I put it that way deliberately, that he is suffering from a number of health problems as a result of abuse he suffered in Afghanistan. "I do not like to speak to anyone or socialise with anyone. I just keep myself secluded from everyone as a result of the abuse I have suffered."

8. Mr Shahabi's short recent witness statement, dated 27.2.14, states at §7 that the appellant resides with him and at §8 that, "He is a very reserved person who keeps himself to himself. He is unable to socialise with anyone and finds it difficult to be around people as a result of the abuse he has suffered over the years when he was in Afghanistan." This statement, remarkably similar to that purported be of the appellant as cited above, offers no substantial support for the appellant's case.

9. At the First-tier Tribunal, shortly prior to the appeal hearing, the appellant allegedly fainted on two occasions and was taken by ambulance to hospital accompanied by Mr Shahabi. Counsel Ms Praisoody sought an adjournment of the hearing. However, it transpired that the appellant had not been intending to give any evidence, though Mr Shahabi was proposing to do so on the appellant's behalf. I doubt, given the content of his witness statements that Mr Shahabi could have offered much relevant to the appellant's claim.

10. Judge Lobo took account of the fact that there had been two previous adjournments for the purpose of obtaining medical evidence as to the appellant's condition, but no such report had ever been produced. Apparently, it was decided by or on behalf of the appellant that it was too expensive. That remains the case, there is no medical evidence. In the circumstances, the judge considered that as the appellant was represented and the appellant was not going to give evidence, and that Mr Shahabi's evidence was of apparently marginal relevance, that there was no purpose in the adjournment application and decided to continue with the appeal hearing. At 8 the judge has set out his carefully detailed reasons for refusing the adjournment application.

11. In passing I note that I have seen the examination notes from the hospital receiving the appellant following his fainting spells at the First-tier Tribunal. It seems that he did not speak to the medical staff there either. It was found that he has high blood pressure. Mr Shahabi produced a bag of antibiotics and other medicines but the fact remains that there is no medical explanation for the appellant's mute and unseeing behaviour.

12. At the hearing before me, the appellant came in with eyes closed and proceeded to cough, spit, and throw up on the floor. I adjourned briefly for Mr Shahabi to take him out to see if he needed medical treatment. They returned a few minutes later and although the appellant continued his fits of coughing, Mr Shahabi did not seek an adjournment. He had little to say about the appellant or his condition or indeed the grounds of appeal. I am at a loss to know how the grounds came to be drafted, given the appellant's either refusal or inability to speak or open his eyes. Mr Shahabi assured me that he had been like this for some 11 years. I have to say that like Judge Lobo (§8(e)), and in the absence of medical evidence, I very much suspected that the appellant was feigning in an attempt to obstruct the resolution of the appeal process. Whether that is right or not, may not matter as it appears to have had no bearing on the judge's treatment of the appellant's case and assessment of the evidence.

13. The grounds of appeal complain first that the judge wrongly refused to adjourn the hearing held on 19.6.14, but decided to proceed in the absence of the appellant and his cousin Mr Shahabi. Second, that the decision does not show the "requirement of anxious scrutiny."

14. In refusing permission to appeal, Judge Kelly suggest that it was impossible to see how a fair-minded observer, appraised of all the circumstances, could reasonably have concluded that justice had not been done. "The fact that the hearing of the appeal had been twice previously adjourned – in order to obtain a medical report which the appellant had ultimately concluded he could not afford – was certainly a factor which informed the Tribunal's decision to proceed in spite of him being ill on the day in question [paragraph 6]. Nevertheless, the decisive factor for the tribuna – as it would no doubt have been for the hypothetical fair-minded observer – was the fact that not only was the appellant represented at the hearing, but also the fact that it had not in any event been his intention to give evidence [paragraph 7]. The application thus fails to disclose an arguable error of law on the ground that justice was not seen to be done."

15. In granting permission to appeal, Judge Goldstein found that the grounds "raise an arguable challenge to the First-tier Tribunal Judge's decision to refuse the appellant's adjournment request and as to whether in the circumstances it deprived the appellant of the opportunity of a fair hearing."

16. The overriding objective is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible in the interests of the parties to the proceedings and in the wider public interest.

17. In R(on the application of AM (Cameroon) v AIT [2007] EWCA Civ 131, the Court of Appeal held that unfair decisions on interlocutory matters, such as adjournments or the admission of evidence, can amount to errors of law. Such decisions will have to be grounds for arguing that they display gross procedural unfairness or a complete denial of natural justice. In the instant case the Court of Appeal thought that was the case because the judge refused to adjourn when the appellant was medically unfit to give evidence; because he listed the case for a day when counsel was not available; and because he refused permission for evidence to be taken on the phone.

18. In Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) it was held 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.

19. 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; to determine whether there was there any deprivation of the affected party's right to a fair hearing. Given that the appellant was not going to give evidence, was represented, and that such evidence as Mr Shahiba might give (considering his witness statement) was of marginal relevance, I find that the appellant has failed to demonstrate that there was any deprivation to the right of a fair hearing. I fail to see what would have been different had the appellant and Mr Shahiba not left the appeal hearing before the First-tier Tribunal. Everything that could have been said was advanced by the appellant's legal representative.

20. In the light of the matters set out above and for the reasons given, I find that the judge gave proper and careful consideration to the adjournment request and that the refusal did not in fact amount to procedural unfairness to the appellant.

Conclusion & Decision:

21. For the reasons set out above, I find that 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: Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup

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 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

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 (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and 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 in this case and thus no fee award can be made.

Signed: Date: 21 November 2014

Deputy Upper Tribunal Judge Pickup