Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10928/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 01st May 2018	**On 11th May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

GHH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. G. Lee, Counsel, instructed by Liberty & Co Solicitors
For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Cary, promulgated on 18 December 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant asylum.

2. As this is an asylum appeal I make an anonymity direction.

3. Permission to appeal was granted as follows:

   "The material faxed after the hearing appears to have reached the file on 1 December, before the judge signed his decision on the 4th: however

nothing seems to have been done to bring it to his attention before that went out on the 18th. It is wholly unsatisfactory for a judge to be expected to deal with material filed after the hearing, which he has neither invited nor had an opportunity to consider. However, since this was the factual situation in at least one of the cases in *E & R [2004] EWCA Civ 49*, arguably the Upper Tribunal should have an opportunity to consider what should be done in such circumstances, and permission is granted on this point only."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Error of Law

5. I was referred by both representatives to the case of SD (treatment of post-hearing evidence) Russia [2008] UKAIT 00037. The headnote states:

"In the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in Ladd v Marshall [1954] 1 WLR 1489. Under those, a tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the result and was apparently credible. If, applying that test, the judge was satisfied there was a risk of serious injustice because of something which had gone wrong at the hearing or this was evidence that had been overlooked, then it was likely to be material. In those circumstances, it will be necessary either to reconvene the hearing or to obtain the written submissions of the other side in relation to the matters included in the late submission."

6. However, I find that the circumstances of this appeal are distinguishable from SD. SD considers circumstances where a judge receives a submission of late evidence. In those circumstances he has then to consider the principles in Ladd v Marshall.

7. The chronology of this appeal is as follows. The hearing took place on 24 November 2017. Mr. Lee referred to the note of the hearing produced by Ms Revill who represented the Appellant in the First-tier Tribunal. In the post-hearing conference the Appellant produced some untranslated documents. Ms Revill instructed the Appellant's solicitors to have them translated in order to establish if they were of any relevance. If they were, they could be sent to the Judge. On 1 December 2017 the translated documents were sent to the Tribunal, marked for the attention of Judge Cary, and marked as extremely urgent.

8. The decision was prepared on 4 December 2017 but was not promulgated until 18 December 2017. Where this appeal is distinguishable from SD is that it does not appear that the documents sent to the Tribunal on 1 December 2017 were ever sent to Judge Cary. Having been received by the Tribunal by fax on 1 December 2017, they were received prior to Judge

Cary writing his decision, albeit by only a matter of three days. They were received seventeen days prior to that decision being promulgated. During this period they were not sent to Judge Cary.

9. I find therefore that there was no judicial consideration of the principles in Ladd v Marshall as the evidence received after the hearing was not sent to the Judge and he was in ignorance that it had ever been provided. As submitted by Mr. Clarke, it is not ideal for evidence to be submitted after a hearing. He referred to the directions which stated that all evidence to be relied on must be provided five days in advance of the hearing. However, this evidence was provided to the Tribunal while the Judge still had to determine the appeal. It is established in caselaw that a judge is still seized of the matter until the determination is promulgated.

10. Had the judge received these documents prior to the preparation or promulgation of his decision, he would have been in a position to decide whether it was necessary to reconvene the hearing in order to consider this further evidence. This did not happen. Over two weeks elapsed between the submission of the evidence and the promulgation of the decision. I find, as submitted by Mr. Lee, that there was no "turning of the judicial mind" to this material prior to promulgation of the decision. This appeal is not brought against the Judge's decision not to admit late evidence, but is brought due to the systemic failure which resulted in there being no judicial consideration of the late evidence. Consequently I find that the decision of the First-tier Tribunal was not made on the totality of the evidence which was within the Tribunal's possession. This is not the Judge's fault, but I find that this procedural irregularity has resulted in a material error of law.

11. It is clear that the documents are relevant and material to the Appellant's appeal. Document GH7 goes to the findings at [38]. The Judge found that there was no evidence that there was ever a strike, and further that the Appellant had produced no evidence that the company actually existed. The document provided at GH7 names the company and states the date of the strike. At [34] and [36] the Judge addressed the issue of the three men who had founded the Lao Dong Viet association, see [10] of the Appellant's witness statement. At GH3(i) there is a document which refers to the founder of the Lao Dong Viet, the same name as the Appellant gave. Further, they are publicly available documents from news websites, not documents produced for the purposes of the appeal.

12. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. In the circumstances, given the procedural nature of the error, and the extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

13. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

14. The appeal is remitted to the First-tier Tribunal to be remade.

15. The appeal is not to be heard by Judge Cary.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 10 May 2018

Deputy Upper Tribunal Judge Chamberlain