



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

Appeal Number: PA/01022/2017

THE IMMIGRATION ACTS

Heard at Field House

On 21 June 2017

**Decision & Reasons
Promulgated
On 06 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

**MR NAVATHEESAN YOGANATH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah of Counsel instructed by Linga & Co
For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born on 20 June 1986. The appellant arrived in the United Kingdom on 12 June 2009 on his own passport with a Tier 4 (General) Student visa which was valid until 31 January 2013. His student leave was extended until 30 August 2014. On 3 April 2014 the

respondent wrote to the appellant informing him that his leave had been curtailed because the sponsor had advised the respondent that the appellant had ceased to study at the college. On 3 June 2014 the appellant made an application for a residence card which was refused by the respondent on 24 July 2014. A further request for a residence card was made on 22 August 2014 which was refused on 4 November 2014. The appellant appealed against this decision but his appeal was dismissed on 16 June 2015 and permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision was refused on 14 December 2015 and a renewed application refused on 15 January 2016. Six months after the Upper Tribunal refused permission to appeal the appellant made an appointment on 19 July 2016 to claim asylum. The respondent refused the appellant's claim for asylum on 18 January 2017.

The appeal to the First-tier Tribunal

2. The appellant appealed against that decision to the First-tier Tribunal. In a decision promulgated on 3 April 2017 First-tier Tribunal Judges Woodcraft and Craft dismissed the appellant's appeal. The First-tier Tribunal found that the appellant was not a credible witness and did not accept his account dismissing his asylum appeal. The Tribunal also found that the appellant did not have a valid claim for humanitarian protection and also dismissed the appeal on Article 8 grounds.
3. The appellant applied for permission to appeal against the First-tier Tribunal's decision. The grounds of appeal assert that the hearing before the First-tier Tribunal was not a fair hearing. It is submitted that the First-tier Tribunal did not consider properly the authority of the case of **Nwaigwe [2014] UKUT 418** which makes clear that the test to be applied is that of fairness. It is asserted that the judge ignored the fact that both the appellant and his representative made it clear that they simply did not have the appellant's file. It was impossible in the circumstances to instruct Counsel or anyone else in the absence of the file.
4. On 8 May 2017 First-tier Tribunal Judge McClure granted the appellant permission to appeal.

The hearing before the Upper Tribunal

5. Ms Jegarajah submitted that in this case the appellant was claiming asylum and it was clear from the Reasons for Refusal Letter that credibility was in issue. She submitted that in these circumstances it was necessary for legal submissions to be made on behalf of the appellant. She referred to paragraph 25 of the case of MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC). She submitted that it is made clear that there is no requirement to show materiality. The question was ultimately whether or not the hearing was conducted fairly and that included the perception of fairness. She submitted that Mr Lingajothy was hospitalised for three days and had the file with him. In those circumstances it was virtually

impossible to arrange for another representative to attend within the two day period between the accident and the date of the hearing.

6. Mr Tufan submitted that although it was not the appellant's fault that he had no representation, on the facts of this case even if Mr Lingajothy had been present there could have been no other outcome. He submitted that the appellant had tried everything to get leave to remain in the United Kingdom and had been unsuccessful. He submitted that even at the highest, if the appellant's case was to be believed, he was someone who was involved with the LTTE. This would not put him at risk now on return. He submitted that he had not engaged in any activities in the UK to be perceived as somebody who had destabilised the unitary state.
7. In reply Ms Jegarajah submitted that materiality is not in issue on an application for permission to appeal because the appellant was denied a fair hearing. The merits are not relevant to the issue.

Discussion

8. The First-tier Tribunal set out details of the letter from the appellant's solicitors, Linga & Co, that was faxed to the Tribunal requesting an adjournment. At paragraph 15 the Tribunal set out:

"15. On 1 March 2017 the Appellant's solicitors Linga & Co sent a fax dated 28 February 2017 noting that the Appellant's asylum appeal was to be heard the following day on 2 March 2017 at Hatton Cross. The Appellant had instructed Mr V P Lingajothy, the firm's principal, to represent him at the hearing. The letter continued:

'Unfortunately, Mr Lingajothy met with an accident late last night and he is currently admitted at the Royal Gwent Hospital, Cardiff Road, Newport NP20 2UB. Mr Lingajothy was travelling to Wales last night to attend the hearing in Bradford today. He took [the Appellant's] entire file of papers with him as he believed he would be returning to London late tonight. Unfortunately we are finding it very difficult to find a barrister who would be able to attend the hearing tomorrow to represent [the Appellant] at the last minute. The fact that we don't have a physical file of papers in the office here in London is making this process even more daunting. Furthermore [the Appellant] has instructed us to submit an adjournment request to the Tribunal so that Mr Lingajothy will be able to attend at a later hearing date. He opines that Mr Lingajothy knows his case the best and will therefore be able to do justice to his appeal.'

16. This application was considered by the Duty Judge but refused on the grounds that it was unclear why Mr Lingajothy was in Wales for a hearing in Bradford. Furthermore, counsel could be instructed and the hearing should go ahead. This decision prompted a further letter from the Appellant's solicitors also dated 28th of February 2017 but evidently written on 1 March which said:

'We wish to clarify that Mr Lingajothy runs a nursing home and was on the M4 on the Severn Bridge connecting Wales to England when the said accident occurred. He was then taken to the Royal Gwent Hospital in Wales following this incident. Mr Lingajothy was going to go to Bradford and stay the night there to attend the hearing today, which is now been adjourned due to the accident. The reference number for this appeal is PA/11161/2016 ... As we don't have [the Appellant's] physical file in the office, we cannot provide any counsel with copies. Mr Lingajothy is in hospital and he does not know anyone or has anyone to find a way to send us the file in Wales. Furthermore, our client does not wish any other counsel to represent him. He states that due to his past experience in Sri Lanka, he finds it difficult to trust people and confide in them. However, as he is known Mr Lingajothy for several years, he trusts him and feels confident with Mr Lingajothy representing him. [The Appellant] states that Mr Lingajothy known about him, his life, past experiences and the problems he suffered in Sri Lanka to a great extent. He therefore strongly believes only Mr Lingajothy will be able to properly litigate his case'.

The hearing before us

17. On 2nd of March 2017 the matter was called on before us when the Appellant attended but there was no representation for him. The Appellant stated that he believed his representative was in hospital following an accident. He had been told this by the staff at the solicitor's office yesterday morning (1st of March). They had rung him and he had gone into their office. He was paying his solicitors privately. He did not know how much, his aunt had arranged that. They had not sent anyone else to represent him because Mr Lingajothy was the one who knew his personal history. He had seen a psychiatrist about 2 to 3 weeks ago but could not remember the doctor's name. He was not content for his case to proceed in the absence of a representative as it was depressing him more.
18. The Presenting Officer indicated that the application for an adjournment was opposed. There was no evidence beyond the solicitor's letters that the representative was unable to come. The Appellant was over the age of 20, he had not suffered any sort of trauma, he was not a vulnerable witness.
19. We considered the application for an adjournment in the light of the authority of **Nwaigwe [2014] UKUT 418** that the only test of whether to adjourn is one of fairness. The Appellant indicated he had now changed his mind and would like somebody else to come to court with him instead of Mr Lingajothy. He said he had been shown a photograph of the accident by the staff in the office although no such photograph had been sent to the Tribunal and the Appellant did not have a copy with him (even though he claimed he had been given a copy). He said he had been to the solicitor's office about a week ago but he had not been shown any statement to sign.

20. Would refusing an adjournment deprive the Appellant of the opportunity of having a fair hearing? Although there was said to be supporting evidence available to show that Mr Lingajothy had indeed been involved in a car accident, no such evidence was shown to us. It was difficult to understand why a firm of solicitors could not obtain a letter or some other confirmation from a hospital regarding the treatment given to their own principal. From the tone of their letters it did not appear that they had even tried but no explanation for this inactivity was given. By itself this might not be conclusive, but what we were further concerned about was the lack of preparation in this case. The Appellant's bundle which we have itemised above consisted largely of documents taken from the respondent's bundle. No statement had been prepared and no application for an adjournment was made on the basis that medical evidence was awaited. The Appellant's representatives had at least 2 clear days between 27th of February when the traffic accident apparently occurred and 2nd of March when the hearing came before us to arrange alternative representation for the Appellant. The excuse that the Appellant only wanted Mr Lingajothy was found on examination of the Appellant not to be the case. The Appellant's case had not been properly prepared and the Appellant's representatives had not had the courtesy to the Tribunal to arrange for alternative representation for the Appellant.
21. The Appellant claimed to have put his solicitors in funds but he was vague about this and it was difficult to avoid the conclusion that if the case were to be adjourned it would be in no better condition at the end of the period of adjournment than it was on the day of the hearing particularly as so little had been done on the Appellant's case. We therefore indicated to the Appellant that we were not prepared to adjourn the case as we did not consider that the requirements of fairness meant that the case must inevitably be put off to another date. We were aware that the Appellant was unrepresented and therefore we asked the Appellant a number of questions to assist him with the preparation and presentation of his case."
9. It is clear from the First-tier Tribunal's decision that credibility of the appellant was in issue. One of the features of the case that the First-tier Tribunal noted was an apparent lack of preparation. This suggests that the appellant's case was not likely to be presented at its highest from the documents before the First-tier Tribunal. The First-tier Tribunal were quite correctly concerned about the lack of evidence submitted to confirm that Mr Lingajothy had been admitted and treated in hospital. Indeed no such evidence was provided at the hearing before me. However, in considering that it was unreasonable for an alternative representative to have not been instructed it appears that the First-tier Tribunal have not taken into consideration the assertion that the solicitors did not have the appellant's file of papers.
10. When considering a request for an adjournment the Tribunal must always yield to a party's right to a fair hearing. As was set out in the case of **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** at paragraph 8:

“In determining applications for adjournments, judges will also be guided by focusing on the overarching criterion established in the overriding objective which is that of fairness.”

- 11.** It was through no fault of the appellant that he was unrepresented at the hearing. On the facts of this case, given that credibility was core to the appellant’s claim, that this is an asylum claim and it did not appear to have been well-prepared, that there was no realistic prospect of being able to instruct an alternative representative as the appellant’s solicitors did not have a file, the interests of fairness and the right to a fair hearing were not fully considered by the First-tier Tribunal.
- 12.** I find that there was a material error of law in the First-tier Tribunal’s decision not to grant an adjournment. I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (‘TCEA’). I remit this case to the First-tier Tribunal pursuant to section 12(2)(b) and 12(3)(a) of the TCEA to be heard at Hatton Cross on the next available date before any judge other than Judges Woodcraft and Craft.
- 13.** I indicated to Ms Jegarajah that it was surprising that Mr Lingajothy had not submitted evidence from the hospital of his three day hospitalisation with his witness statement. This is particularly so given the fact that the First-tier Tribunal had expressed concern at the lack of evidence from the hospital. Ms Jegarajah indicated that she was confident that she would be able to obtain that evidence and have it faxed to the Tribunal today.
- 14.** The medical evidence had not been produced to me by 4:30pm. Although it is not for me to bind the hands of the First-tier Tribunal I have indicated that the appellant’s representatives ought to submit the medical evidence of Mr Lingajothy’s hospitalisation.
- 15.** I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law. The decision is set aside. The case is remitted to the First-tier Tribunal at Hatton Cross for a re-hearing on the next available date before any judge other than Judges Woodcraft and Craft.

Signed P M Ramshaw

Date 4 July 2017

Deputy Upper Tribunal Judge Ramshaw

