Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: PA/09843/2016**

PA/09866/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th October 2017	**On 18th October 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR J A
MRS S A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Hassan, Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are husband and wife, both Indian nationals, born on 25 December 1977 and 5 December 1983 respectively.

2. The first appellant's asylum claim was dismissed by L M Shand QC and at the same time she made a finding that the second appellant made no claim for asylum in her own right and accordingly had no valid right of appeal but nonetheless even if that was incorrect her appeal was dismissed.

3. The grounds of appeal were twofold.

4. First, it was submitted that the First-tier Tribunal Judge materially erred in refusing to adjourn the hearing so the applicant could undergo a psychiatric assessment and obtain a medical report.

5. The first appellant suffered from paranoid schizophrenia with severe physical manifestations but, it was submitted, there was no evidence to assist the Tribunal in determining the extent and the degree of the appellant's mental health problems.

6. A written application for an adjournment was refused previously by a different judge on the basis that a medical report was unlikely to be of assistance on the narrow issue of whether the appellant would be entitled to international protection. It appeared that the First-tier Tribunal Judge agreed with this assessment at paragraph 28 of her decision.

7. At paragraph 28 the judge stated:

> "*I refused the motion to adjourn. A ruling had already been made on the adjournment request made on 28th October 2016 and I agree with the reasons given by the First-tier Judge who made that ruling*."

8. At paragraph 21 the judge clearly set out the reasons for the application on 28 October 2016 (the hearing was on 3 November 2016) for relisting for mid February 2017. There was to be an application for legal aid in order to fund preparation of a report on the first appellant's mental health by a psychiatrist. The purpose of the report was said to be a report on "findings of fitness to give evidence at the court, his background information, his current medication and prognosis and his fitness to travel by air etc".

9. The grounds for application for permission to appeal stated that the application for adjournment was renewed on the same basis of the written application and it was argued that a psychiatric report was required to fully assess the extent of the applicant's illness, his prognosis whether he would be fit to fly, whether he would be able to access treatment and to determine whether he required a litigation friend. It was in this context that the First-tier Tribunal determined that a medical report would not be of assistance to the main issue of protection and she enquired instead about the relevance of a litigation friend.

10. It was, however, argued that following the guidance given by UNHCR and contrary to the First-tier Tribunal's finding a psychiatric report would have assisted the Tribunal in determining whether and to what extent the appellant's mental illness could be attributed to the harassment by his family, and to what extent he might be able to avail himself of the protection of the Indian authorities, and the appropriate approach to be adopted in assessing the applicant's claim under Article 3 and paragraph 276ADE(vi) (very significant obstacles). More specifically at paragraph 207, *"...a mentally disturbed person may, however, be a refugee and while his claim cannot therefore be disregarded, it will call for different techniques of examination"*.

In paragraph 208:

> "*The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case... The conclusions of the medical report will determine the examiner's further approach*."

11. It was argued that in the present case the appellant's claim called for a different technique of examination. His ill-health rendered him unfit to be interviewed and there was no interview record before the Tribunal, there were no witness statements and the appellant was not fit to instruct his representatives. The appellant's asylum claim was therefore determined solely on the basis of his wife's evidence without any consideration of independent evidence which could have contextualised his claim and benefited him.

12. It was submitted that in the light of the above the First-tier Tribunal Judge materially erred in refusing to adjourn the hearing despite not having sufficient information about the appellant's mental health problems or claim.

13. Insofar as it was argued that Dr Albanese's report would have been limited due to him having met the appellant only once, the Tribunal was referred to the fact that the doctor considered the possibility of identifying the most appropriate professional to file the report in the event he himself could not.

14. The second ground of appeal was that there was procedural unfairness in that the appellant's representative had requested an Indian Tamil interpreter but the interpreter that was in fact booked was a Sri Lankan Tamil who spoke with a Sri Lankan dialect. This matter was not brought to the First-tier Tribunal Judge's attention at the time. The Tribunal had asked the appellant's wife and interpreter to speak to each other about the journey that morning and the appellant's wife thought they did understand each other despite the difference in dialect but it was only when she started to give her evidence that she realised the interpreter was miscommunicating her responses and she was struggling to understand. She tried to correct him and repeat her answers but the Tribunal was unaware of the communication difficulties, therefore those difficulties were not brought to the attention of the judge.

15. It was only after the hearing that the appellant's wife informed Counsel of such difficulties and the representatives wrote to the Tribunal on 25 November 2016 for the attention of the judge in order to bring the matter to her attention. Resident Judge Conway responded on 15 December 2016 stating that the judge was still considering the case and he could not interfere with the independent process.

16. In the light of the significance of the issues concerned and considering the correct interpreter was requested but not provided, the error being that of the Tribunal's service it was submitted that permission to appeal should be granted. This particularly was important as the appellant's account was not considered and his claim was rejected on the basis of adverse credibility findings of his wife's account.

17. Ground 3: The judge was invited to consider the appeal in the light of **Paposhvili v Belgium (Application No. 41738/10)** and in the light of the above it was clear that the threshold for the engagement of Article 3 was not limited to near death cases.

18. Permission was granted by First-tier Tribunal Judge Rintoul stating that "it is arguable in the light of **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123** that First-tier Tribunal Judge L M Shand QC erred in not adjourning the appeal to permit the production of psychiatric reports.

19. It was also arguable that there was a procedural error in relation to the interpreter, albeit that this was not brought to the attention of the judge during the hearing. There is considerably less merit in ground 3 but I do not refuse permission on that ground. Further, it is my preliminary view that the first appellant ought to be treated as a vulnerable person.

20. As such there was a direction that the solicitors were to inform the Tribunal in writing within fourteen days of the issue of the notice as to whether the appointment of a litigation friend was necessary and to make an application to that effect within 21 days of the issue of the direction.

21. At the hearing Ms Hassan submitted that the first appellant had not expressed himself in detail and the idea was to obtain a report and go through his mental health difficulties to assist the Tribunal to look at his capacity in the round. If PTSD was diagnosed, what its causation was and whether the condition was attributable to what had happened in India. The report was relevant to his asylum, Article 3 and Article 8 claim.

22. The adjournment was also required on the basis that if he was found to lack capacity to instruct to participate in the proceedings he may need a litigation friend. There was still no psychiatric report but the second appellant could not be given the position of a litigation friend. It may be that he had not told the wife everything. It was clear he lacked capacity but ultimately the appellant did not get a fair hearing. The appellant had not been enabled to get evidence to assist with his case.

23. In relation to ground 2 it was accepted that when the issue arose the judge was not made aware of it. It was a fact that dialects differed and the appellant was afraid during the hearing to give her proper evidence and it was only afterwards that she raised the issue with Counsel.

24. I raised the issue of the examination-in-chief which was lengthy and the Record of Proceedings but Ms Hassan stated that she did not speak the language and was not aware that there were difficulties.

Conclusions

25. In relation to ground (i) the key issue is the authoritative guidance in **SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284** and that establishes that "the test and sole test was whether it was unfair". In **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** the President emphasised the importance of the test of fairness and the question of whether a party would be deprived of a fair hearing if an adjournment was refused.

26. **AM (Afghanistan) v SSHD** stresses that consideration must be given to the Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult Witnesses' issued by the Senior President, on 30 October 2008 and the joint Presidential Guidance Note No.2 of 2010. The aforementioned guidance appears as annexes to that decision.

27. I am not persuaded that the judge failed to treat the first appellant as a vulnerable witness. She was fully aware of his mental health issues and was content that the report, in the circumstances sufficed and that the wife, could give evidence. There was no suggestion that the husband would either before the Tribunal or in the future would give evidence.

28. It is quite clear that the judge set out the application for the adjournment in some detail between paragraphs 21 to 28 and she noted the reason for the adjournment request. As the judge rightly identified the letter of Dr Timehin had considered that the diagnosis of the first appellant's condition was one of established schizophrenia (and I note he did not identify PTSD). What he did state in his letter of 22 April 2016 was:

> "*They are being supported by church, their Pastor and are not in contact with extended family here or abroad. His wife explained that they have a lawyer working on his asylum status and she wondered if his condition was mostly due to family disharmony and may be past history of abuse. I am disinclined to think that this is the case, given that he was educationally quite able and that it was only after his arrival in the UK that signs of illness began to emerge. I do not think: his diagnosis is one of PTSD with psychosis but one of established Schizophrenia and given the presence of both positive and negative symptoms*."

29. The judge rightly noted however that the email correspondence between the appellant's representatives and Dr Albanese from whom they wished to obtain a report. She reasoned:

> "*22. One of the items of correspondence attached by the first appellant's solicitors to the request for an adjournment was an e-mail from these agents to Dr Albanese dated 27th October 2016. In that e-mail Dr Albanese stated that he had 'very little personal knowledge of [the first appellant]' and that fact might 'complicate my assessment and preparation of report'. Dr Albanese further observed that since he had seen the first*

appellant the first appellant had moved to live in Stoke Newington which was very distant from his team base.

23. *The letter of referral of 22nd April 2016 from Dr Timehin referring the first appellant to Dr Albanese was also attached to the adjournment request. In this letter Dr Timehin noted that when he had seen the first appellant on 22nd March 2016 the first appellant he had remained quite paranoid with persecutory beliefs that people are out to get him, that he was distracted by auditory hallucinations, could not tolerate too many people around him and had a persistent belief that people were not good. Dr Timehin further recorded in the letter of 22nd April that the second appellant had reported to Dr Timehin that the first appellant used to be 'quite able with a first class Masters in building sciences' and that ability had disappeared. Dr Timehin further recorded that the second appellant had reported to him that the first appellant sat at home all day, mute and could not tolerate watching the TV, and that he was unable to attend to his activities of daily living without prompting; and that the first appellant was reported by the second appellant to display significant apathy, avolition, a motivation and alogia.*

24. *The request for an adjournment was refused by a judge of the First-tier Tribunal on 31st October 2016. In the refusal notice it was stated that if the appellant was unfit to give evidence a short letter should suffice, and a full medical report on the first appellant was not likely to be of assistance on the narrow issue of whether he was entitled to international protection.*

25. *When the case came on for a hearing before me on the 3rd November the first appellant was not present, but the second appellant was present. As already noted Wimbledon solicitors had intimated a witness statement from the second appellant and that she was to be a witness in the appeal. The request for an adjournment was renewed before me by Ms Hassan.*

26. *When I asked what was the reason for the new adjournment request Ms Hassan said that the solicitors were in a difficult position. They did not know if they were properly instructed. She said that a litigation friend may have to be instructed. I asked what would be the purpose of instructing a litigation friend. Ms Hassan said that the litigation friend could 'consider to what extent the matters before the Tribunal are properly presenting the appellant's case and can speak for him in a way that S A cannot'. She did not elaborate on what she contended a litigation friend could say on behalf of the first appellant which the second appellant could not say. Ms Hassan also suggested that a litigation friend could conduct a search of the first appellant's papers to see if there was anything therein that might help his appeal.*

27. *The motion for an adjournment was opposed by Ms Chopra. She submitted that a litigation friend should have been considered before now, and in any event the view appeared to have been taken that the second appellant would represent his interests. As far as the reasons for the earlier adjournment request were concerned she observed that other than confirmation of the diagnosis and treatment it was not clear what a report from a psychiatrist would add. The respondent's position was that the first appellant's condition could be treated in India. There had been no suggestion to date that the first appellant was not fit for travel. In any event that was a matter that would only arise if the appeal was refused.*

28. *I refused the motion to adjourn. A ruling had already been made on the adjournment request made on 28th October 2016 and I agree with the reasons given by the First-tier Judge who made that ruling. There was clear evidence before me that the first appellant was unfit to attend the hearing. No further medical report was required to confirm that. There was no suggestion that the first appellant would be fit to attend at any adjourned hearing in the near future, or indeed at all. A psychiatrist's report was not required to advise on the first appellant's medication. A medical report was not required simply to bring that information before the Tribunal. In any event it was not a ground of appeal that the first appellant was prescribed a particular medication which could not be obtained in India. As far as the question of the first appellant travelling is concerned, there had been no suggestion to date that the first appellant was not fit to fly. In any event, as Ms Chopra submitted, that was a consideration that would only arise after the appeal if the appeal was refused. It was unclear what was meant in the letter of 28th October when it was stated that a report by Dr Albanese could comment on the first appellant's 'back-ground information'. Any 'background information' that Dr Albanese could obtain could only come from the first appellant himself or his wife, the second appellant. The second appellant was in a position to give evidence, so far as relevant to the issues under appeal, about what she knew of the first appellant's 'background information' including information which she had obtained about that from the first appellant. As far as a litigation friend was concerned it was entirely speculative whether a trawl through the first appellant's personal possessions would have thrown up anything of assistance to his appeal. It is reasonably to be expected that the second appellant would have conducted such a search herself if there was any reason to believe that it would contain anything that assisted the first appellant's appeal. I was not persuaded by the vague assertion that a litigation friend could 'consider to what extent the matters before the Tribunal are properly presenting the appellant's case and can speak for him in a way that S A. The second appellant claims to have shared*

the first appellant's experiences of alleged persecution and ill-treatment in India. It seemed to me that the second appellant was a person best placed to speak for the first appellant where he was not in a position to give evidence himself.

29. After I gave my ruling on the motion for an adjournment the second appellant gave evidence. The language was Tamil. The second appellant confirmed that her witness statement had been read to her in a language which she understood, that she had signed it, and that she was happy to adopt it as her evidence."

30. What was identified by the judge was that the first appellant sat at home all day and was mute. I note that not only had the solicitors not in fact obtained legal aid for the purpose of obtaining a report but that the report from the psychiatrist that they wished to instruct had indicated that a report was likely to be complicated by the fact that he had very little personal knowledge of him. Not only was the appellant stated to be mute but also the psychiatric medical professional was apparently resisting his instruction. There was no indication that his instructions could be obtained in any other form. The judge took the view that his wife would be the best person to put his case forward. That was open to the judge in the circumstances.

31. The question is whether at paragraph 24, where the judge stated that the previous adjournment was refused and a full medical report on the first appellant was not likely to be of assistance on the narrow issue of whether he was entitled to international protection. Was that a fair assessment? The judge had explored the avenues in relation to the request for the psychiatric report and when she asked the reason for the new adjournment request at the hearing, she recorded that the representative did "*not elaborate on what she contended a litigation friend could say on behalf of the first appellant which the second appellant could not say*". It should be remembered that the first appellant was the wife of the second appellant and it was always their case that they had been through the events together. Indeed that was the representation made by Counsel on behalf of the Secretary of State. In view of the medical evidence which was already before the Tribunal and in view of the limitations on legal aid and in view of the fact that the wife was able to give information on behalf of the first appellant, as the judge recorded it was not clear what a report from the psychiatrist would add. It was the respondent's position that the first appellant's condition could indeed be treated in India.

32. Although the judge did not, at paragraph 28, specifically mention the word fair she did accept that the medical evidence showed that the first appellant was unfit to attend the hearing and that there was no suggestion that the first appellant would be fit to attend any future hearing. She explored the reasons why any further psychiatric report would be required noting that it was not required to advise on medication and there was no question or suggestion that the first appellant was not fit to fly. In any event this was only a consideration that would arise if the appeal was refused. As the judge found, any "background information" that Dr

Albanese could obtain could only come from the first appellant himself or his wife, the second appellant and she was in a position to give that evidence so far as relevant to the issues under appeal including information which she had obtained about that from the first appellant. The judge found that as far as the litigation friend was concerned it was entirely speculative whether withdrawal through the first appellant's personal possessions would have thrown up anything of assistance. The judge was clearly aware that the first appellant was legally represented and that his wife was in attendance at court, albeit that she did not have a formal appeal before the Tribunal. In the circumstances, the judge was entitled not accept that the vague assertion that the litigation friend "could consider to what extent the matters before the Tribunal are properly presenting the appellant's case" and noted that the second appellant claimed to have shared the first appellant's experience of the alleged persecution and ill-treatment in India. That to my mind is a critical issue in this case and the judge indeed found that the second appellant was the best person best placed to speak for the first appellant where he was not in a position to give evidence himself.

33. There was medical evidence before the First-tier Tribunal in the form of a letter from the South London and Maudsley NHS Hospital from Dr Clive Timehin dated 22 April 2016 and which set out the medical difficulties of the appellant. I note that this appeal was lodged by the appellant's solicitors on 15 September 2016 and from the email correspondence it would appear that Dr Albanese was sounded out for a further report on 27 October 2016. This suggests that had the report been more pressing the solicitors would have identified that this was a requirement before that date. Indeed, as the judge recorded at paragraph 20, the letter from Wimbledon Solicitors lodging the appeal was dated 14 September 2016 and the request for the adjournment was dated 28 October 2016 when the hearing had been set down for 3 November 2016.

34. Overall I consider that the judge found that there was sufficient medical evidence together with the evidence given by the second appellant, the wife, in order to conduct a fair hearing.

35. I have considered **AM (Afghanistan) v Secretary of State for the Home Department** but it is clear that there was no possibility that the first appellant would give any evidence and there had been ample time to obtain a witness statement if that had been possible. As identified at paragraph 21(d) of **AM** expert medical evidence can be critical in providing explanations for difficulties and giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet the vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions. It is nonetheless the case that the appellant was *not* to be a witness in his case but it was his wife who had experienced the same events with him, who gave oral evidence. Critically the appellant's vulnerability had been recognised by the judge but those were not factors which were relevant to the limitation of oral testimony

because he did not give any oral testimony. There was a focus in the Tribunal determination on the credibility but the focus was on the wife's account and bearing in mind the letter report given by Dr Timehin, which did not attribute past events to the appellant's problems, and the observations of Dr Albanese, the judge was not persuaded that a full report would have taken this matter further. At all points the appellant was legally represented.

36. I therefore do not conclude that the judge's overall decision to refuse to adjourn was in the circumstances unfair; she gave adequate reasons for refusing to so adjourn. Fairness was implicit in her reasoning.

37. I turn to the second ground of challenge. It is incorrect to suggest that the solicitors requested a specific dialect when requesting a Tamil speaker. The reply notice dated 17 October 2016 is on file and this identified that an interpreter would be needed and in response to the question of whether an interpreter was required, '*if yes', 'please tell us what language and dialect you require'*, the response was merely "Tamil". This is important because the solicitors had not indicated that a specific dialect was required and if it was so important I would expect that that would indeed have been requested. Secondly, at no point did Counsel before the judge raise any issue in relation to the appellant's difficulties with an interpreter.

38. I pointed out that in the Record of Proceedings there were at least four pages recorded of examination-in-chief of the appellant's wife by Ms Hassan and some detailed questioning at the commencement of the hearing. Ms Hassan submitted that she did not speak Tamil and would not understand whether the appellant had understood her or not but the Record of Proceedings do not identify any repeated questions during the examination-in-chief and no recorded requests to re-clarify. I do not accept that by the end of four pages of examination-in-chief that the judge and Counsel would not have identified difficulties with the interpretation or that during the opportunity which was afforded to Ms Hassan to re-examine that those issues would not have been identified.

39. The Record of Proceedings details a flow of examining questions which do not reflect difficulties with understanding. I note that the solicitors wrote to the Tribunal on 25 November 2017, some three weeks after the Tribunal hearing to point out prior to the refusal that:

> "*The appellant's wife speaks some English and she understood that some of what the interpreter was communicating to the Tribunal but when she tried to correct him, she was advised to limit the answers she was giving. Indeed we understand from Counsel that the appellant's wife was on many occasions throughout her evidence asked to answer the question asked and to limit her responses*."

40. This letter also acknowledges that both Counsel and the appellant's wife confirmed that the judge checked the interpreter and the appellant's wife's ability to communicate by asking questions about the appellant's

travel that morning. The appellant's wife asserted in her appeal before me that there were no initial problems but as the questions became more detailed she struggled to understand the interpreter. That the appellant's wife did not say anything to the Tribunal out of fear but she would be considered to be rude and disruptive does not bear close scrutiny on the facts. I am not persuaded that during the hearing which took place over three hours that the appellant would not have signalled difficulties to the legal representative.

41. Turning to the third ground I find no merit in this ground. The domestic law at present is that set out by **N v UK [2005] UKHL 31** and the high threshold remains. The judgment of **Paposhvili v Belgium (no 4173810 GC)** in the European Court of Human Rights may be persuasive but it has not been incorporated into domestic law. I do not therefore find criticism of the judge in this respect. The judge did not accept, [63]-[64] of the decision, on the evidence presented, that there were inadequate medical facilities in India to treat the appellant.

Notice of Decision

42. I find that the decision contains no material error of law and the decision shall stand.

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 their 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. This order is imposed as the appellant has mental health difficulties.

Signed

Helen Rimington
Upper Tribunal Judge Rimington 16th October 2017