



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

Appeal Number: AA/01466/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17<sup>th</sup> September 2015**

**Decision & Reasons Promulgated  
On 28<sup>th</sup> September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**SR (SRI LANKA)  
(ANONYMITY DIRECTION MAINTAINED)**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellant: Ms S Jegarajah, Counsel instructed by APP Immigration Advocates  
For the Claimant: Mr P Duffy, Senior Presenting Officer

**DECISION ON ERROR OF LAW**

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Monson dismissing the Appellant's appeal against the Respondent's decision to refuse him asylum, humanitarian protection or leave under human rights grounds and a removal direction to Sri Lanka under section 10 of the Immigration and Asylum Act 1999 (IS151B, dated 17 December 2012).
2. The Appellant appealed against that decision and was granted permission to appeal by Upper Tribunal Judge Finch on all grounds, including an extension of time. The grounds upon which permission was granted may be summarised as follows:

- (i) As the High Court had found that the basis for a fresh claim for asylum had been made out, and given that two of the Appellant's three witnesses had attended an earlier appeal hearing which could not proceed as the Respondent did not have her file and was not ready, and given that the Appellant was represented at the subsequent CMRH, and given that counsel appeared at the hearing before Judge Monson and said that his clerks could not "trace" the Appellant's solicitors and there being a subsequent letter on file confirming that these solicitors came off record, the right to a fresh claim had been granted on the basis of new evidence, including further witness who were being called to give oral evidence, it was arguably not in the interests of justice to proceed in the absence of the Appellant and his witnesses when the evidence indicated that the Appellant's solicitors had failed to instruct counsel or keep him or the Appellant aware that they were withdrawing their services; and
- (ii) Until the fresh evidence and the fresh oral evidence is before the Tribunal, it was arguably not possible to correctly apply the *Devaseelan* principles or ensure that anxious scrutiny was applied to the fresh claim.

3. I was provided with a Rule 24 response from the Respondent.

### Discussion

- 4. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
- 5. In relation to the first ground, I heard from Ms Jegarajah that her colleague, Mr Paramjorthy was previously instructed by a person named "Seval" of TTS Solicitors to represent the Appellant and whom was instructed at least at the Case Management Review Hearing ("CMRH"), happened to be at the Tribunal the day of the Appellant's substantive hearing and as reflected at §30 of the Decision, attended Judge Monson's court to assist, *de bene esse*. As observed by Upper Tribunal Judge Finch, the Appellant's solicitors nor the Appellant could be "traced". Subsequent to Judge Monson's decision, TTS solicitors came off the record and I am told by Ms Jegarajah that the instructing solicitor, Seval, has "disappeared".
- 6. Mr Duffy did not challenge this evidence but stated it was open to TTS solicitors to attend the hearing and ask for an adjournment; however, with respect that submission assumes that the solicitors were acting according to normal function and competence, and consequently, one would assume they would have been "traceable" or could have been contacted before the hearing proceeded. Given that counsel previously instructed could not trace the solicitors through his clerks, it is clear to me that the judge should have paused for further consideration of the fairness and justice in proceeding with the hearing than is disclosed at §30 wherein it is stated that the judge was "satisfied that the appellant had been given adequate notice of the hearing".

7. It is also unclear whether any attempts were made to contact the Appellant's solicitors or the Appellant, which also give cause for concern, as this task could not be delegated to counsel as it appears to have been whilst he was not instructed to appear. Although counsel did his best to assist the Tribunal, he did not owe of course any duty to the Appellant to provide him with a fair hearing, whereas the Tribunal was under a duty to do so, consider the Appellant's matter fairly and allow him to present his evidence. It seems somewhat unhelpful to have not received written confirmation from the Appellant's solicitors that they were unable to attend or were not willing to before deciding to proceed in their or the Appellant's absence.
8. Given that it also appears that the solicitor in question, Seval, has disappeared and may implicitly have acted unprofessionally, if not negligently, in communicating with the Tribunal as to the whereabouts of the Appellant or his representatives on the day of the hearing, I find in light of the above discussion that the judge's decision to proceed was not in the interests of justice and constituted an error such that the decision and reasons should be set aside in their entirety.
9. I am further fortified in this decision as it is noteworthy that this appeal represented the independent hearing of a fresh claim which had already passed the hurdle of establishing a fresh claim under Rule 353 and represented a claim that might have a reasonable prospect of success before a hypothetical First-tier Tribunal Judge (see Lord Justice Buxton's decision in *WM (DRC) v SSHD* [2006] EWCA Civ 1495 for further discussion). The right to a fresh claim had therefore been granted on the basis of new evidence presented to the Respondent which included further witness testimony which would be obviously embellished by oral evidence and legal representation on appeal (see the decision of Anthony Thornton QC in *ST v SSHD* [2012] EWHC 988 (Admin) for further discussion). Consequently, it was not in the interests of justice to proceed in the absence of the Appellant and his witnesses as their evidence was necessary to properly assess whether the previous Determination should be departed from or maintained in light of the approach outlined in *Devaseelan UKIAT* [2002] 000702 Starred.
10. In my view it was furthermore not in the interests of justice to proceed given that the Appellant had attended both previous hearings before the Tribunal, his absence was anomalous, unusual and unexplained. Given that two of the Appellant's witnesses had attended for a previous substantive hearing (those witnesses were travelling to the hearing from Norway and France, whilst the third witness was from the UK) on 7 May 2013 before Judge Aujla which could not proceed because the Respondent did not have her file and was not ready. The Respondent was afforded the opportunity of getting her house in order. At the subsequent CMRH it was confirmed by the Appellant that he and his witnesses would attend a future substantive hearing, and in their absence, and the Appellant's and his representative's absence at that hearing, and given the history of these proceedings it was in the interests of justice to allow both parties to present their cases without hindrance and was inequitable to not do so.

11. I must observe on Judge Monson's behalf that it does not appear from his Decision that he was aware, or made aware by the Presenting Officer, of the previous adjourned substantive hearing at the Respondent's application, which may have affected his decision to proceed.
12. In the light of the above findings, I set aside the decision and findings in their entirety, as the appeal will need to be re-made *de novo*.
13. As I have allowed the appeal on the first ground, I will not go on to consider the second ground, it being rendered moot by my decision on the first ground.

#### **Decision**

14. The appeal to the Upper Tribunal is allowed.
15. The decision of the First-tier Tribunal is set aside.
16. The appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

#### **Anonymity**

17. The First-tier Tribunal made an anonymity order which I maintain.

Signed

Date

Deputy Upper Tribunal Judge Saini