



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02572/2015

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2017

Decision & Reasons Promulgated
On 28 July 2017

Before

UPPER TRIBUNAL JUDGE PITT

Between

CS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandeghani of Counsel instructed by Duncan Lewis & Co

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

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.

1. This is an appeal against a decision promulgated on 25 July 2016 of First-tier Tribunal Judge C M Phillips. The decision refused the asylum and human rights claim of the appellant in the context of a deportation order.
2. The case has a somewhat complicated history. The appellant came to the United Kingdom in 2001 as a dependant of his parents and was granted indefinite leave to remain in line with them on 15 July 2002. His father had been recognised as a refugee and the other members of the family granted leave in line with the father
3. After having been granted indefinite leave to remain, the appellant commenced a series of criminal offences. The most serious was a conviction on 24 May 2013 for robbery for which, on 11 July 2013, he was sentenced to twenty months' imprisonment.
4. The appellant claimed asylum on 9 October 2013. That claim and a human rights claim based on his Article 8 rights were refused on 21 October 2015. The respondent made a deportation order against the appellant on 22 October 2015.
5. The appellant appealed against the refusal of his protection and human rights claims. In his appeal he was initially represented by KQ Solicitors. A hearing was listed for 25 April 2016. The appellant wrote to the Tribunal requesting an adjournment of that hearing as KQ Solicitors were asking for enhanced fees which he could not pay and he needed time to find a legal representative who would charge him less. The appellant also maintained that KQ Solicitors were refusing to release important papers from his file unless he paid £1,000. He was not prepared to pay them as he considered their services had been inadequate. On the basis of that application the hearing of 25 April 2016 was adjourned. A new hearing was listed for 23 June 2016.
6. The appellant then transferred instructions to Ratna & Co on 14 June 2016. In a letter dated 15 June 2016 Ratna & Co went on record and indicated that there were ongoing difficulties in obtaining original documents from the asylum claim from KQ Solicitors and that the appellant had made a formal complaint to the Legal Ombudsman.
7. Ratna & Co wrote again to the Tribunal on 17 June 2016. They requested an adjournment. The letter is at page 112 of the appellant's bundle prepared for this hearing submitted under a cover letter dated 14 July 2017. The letter of 17 June 2016 states as follows:

"Our client has complained about the services received from his previous representative namely KQ Solicitors who are refusing to release the original documents to our client and also refund the payment he has made. Our client has therefore complained to the Legal Ombudsman who is currently investigating this matter.

On checking the list of documents which are with his previous representatives, we note there are some documents which are important for his Asylum as well as Human Rights Appeal, we therefore seek adjournment of the hearing in the interest of justice."

8. The letter concluded by stating “if the appeal proceeds without the original documents, it may prejudice his Asylum as well as Human Rights claim.”
9. The adjournment request was refused. It was renewed before Judge Phillips at the hearing on 23 June 2016. A skeleton argument setting out the adjournment request was provided and oral submissions made. The skeleton argument referred to the missing documents as “crucial” and set out the head note of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC):

“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. 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 FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party’s right to a fair hearing? See *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284.”

10. Judge Phillips refused the adjournment request and proceeded to refuse the appeal on all grounds. The decision deals with the adjournment in [13] to [20] of the decision:

“13. Directions were sent to the appellant and respondent on 22 February 2016 for a hearing on 25 April 2016. The appellant wrote on 15 April 2016 requesting an adjournment of the hearing fixed for 25 April 2016 because his current solicitor was demanding more money, which the appellant cannot afford. The appellant states that he is not in a position to pay £2500 to his solicitor and needs time to find a solicitor that he can afford. The appellant attached an e-mail including a letter from his representatives stating that a fixed fee of £2500 was agreed and due to limited communication and lack of instructions the appellant’s bundle for the appeal had been only part prepared. The appellant was advised that as discussed the representatives were unable to release the file of papers until payment of £1000 was made for the work carried out so far. Once this payment was made then the representatives would release the papers. The adjournment request was granted and the case relisted for 23 June 2016.

14. On 17 June 2016 new representatives wrote requesting a further adjournment stating that the appellant has complained about the services of his previous representatives who are refusing to release his papers. The appellant has complained to the Legal Ombudsman, who is investigating. There were some documents, which were important, and it was submitted that the appeal could not proceed without these. A list of documents was provided, which were said to be in the possession of the appellant’s previous representative. The adjournment request was accompanied by a letter of complaint dated 07 June 2016, from the appellant to his previous representatives. The appellant also provided a letter dated 09 June 2016 from the Legal Ombudsman intimating that the complaint could not be investigated because the appellant was still within

eight weeks of making his complaint. The adjournment request was refused by the Designated Immigration Judge with reference to *Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)* and the appellant's representative was informed.

15. The adjournment request was repeated at the hearing, which the appellant attended along with his new representative, instructed on 13 June 2016. The appellant's bundle was lodged at court and the appellant's representative received a copy of the respondent's bundle. There was a Tamil interpreter and the appellant's parents attended, both of whom required a Tamil interpreter. The adjournment request was made on the basis that the appellant's representative required more time to read the papers and take instructions; a formal request had been made and the release of the documents from the previous solicitors was awaited; the previous solicitors will not release the documents until the outstanding fees had been paid; the appellant had made a complaint; crucial documents were with the previous solicitor; the appellant's bundle had been prepared without the respondent's bundle and despite directions no OASys Report had been provided.
16. I pointed out that the respondent could not rely upon the findings if the OASys report had not been provided; the case had been adjourned in February at the appellant's request and again in April when all the issues relied upon were the same. The appellant confirmed that the issues were the same stated it had taken him 3 to 4 weeks to obtain a new representative and he had had difficulty instructing solicitors due to the lack of documents.
17. The adjournment request was opposed by the respondent's representative because of the history. The onus was on the appellant to obtain representation and pay the agreed fees. A problem paying the fees did not provide a reason to adjourn. The respondent's representative had spoken to the appellant's representative three days before and could have provided the respondent's bundle then, but was not asked to do so. So far as the medical documents of the parents were concerned it would be expected that these could be obtained. The respondent accepts that the appellant's parents have asylum. The issue is the appellant's risk on return to Sri Lanka and the grant of asylum to the appellant's parents has no bearing on this. Article 8 has to be decided on the evidence. The appellant's fiancée had not attended and there is no medical evidence to show that she is unfit. The adjournment request should be refused and the case proceed.
18. The appellant's representative submitted that the asylum documents were with the previous representative. The paperwork to support, Article 8, live in the UK was still with the previous representative. There had been limited time to obtain documents relative to the appellant's fiancée. There was no OASys Report despite directions asking the respondent to obtain this. I pointed out that the dispute over access to papers could take months to resolve unless the appellant paid the outstanding fees because the representatives were holding the papers until payment was made and the appellant did not intend to pay. The appellant was clear that he had a complaint and did not intend to pay the fees. I tried unsuccessfully to find out what was missing, what was likely to be obtained if an

adjournment granted and from this what could be considered to be determinative.

19. The appellant's representative had prepared a skeleton argument in support of the application to adjourn. In this my attention was drawn to *Nwaigwe*.
 20. In all the circumstances I refused the adjournment request. I had been provided with an appellant's bundle, including a witness statement and I considered that I was empowered and required to refuse the adjournment request and that refusal was in keeping with the over-riding objective of fairness and the 2014 Procedure Rules. The appellant had instructed his present representative 10 days before the hearing. The issues in the refusal could all be pursued during the oral evidence. I allowed the photocopying of some additional papers produced on the day; and, allowed the appellant's representative time at court to prepare with the appellant, before hearing evidence when the appellant's representative indicated that he was ready to proceed."
11. The core decision on the adjournment is at [18] and [20]. In my view the reasoning fails to address material aspects of the appellant's adjournment application. It remained the position before the First-tier Tribunal that documents with potential materiality to the asylum and human rights case, some of them originals, were not available. The First-tier Tribunal accepts this to be so at [18]. This was not simply because the appellant refused to or could not pay £1,000 as set out in [18]. The materials before the First-tier Tribunal indicated that the appellant considered that the level of service in the preparation and progression of his case by his previous advisers was such that he should not be expected to pay them £1,000 and his genuine belief that this was so was evidenced by the formal complaint to the Legal Ombudsman.
 12. In addition, his new legal representatives, had not been provided with the full materials from his claim, including originals of documents, and maintained that they were not in a position to compensate for the alleged shortcomings of the previous solicitors and prepare the case adequately. Those factors were not such that Ratna & Co could have but did not remedy them in the 10 days that they were instructed prior to the hearing. The reasons for finding that it was fair to proceed does not explain how that could be so if potentially material evidence in the asylum and Article 8 claim was missing.
 13. Whilst having some sympathy for the First-tier Tribunal judge faced with the of a number of witnesses being ready to be heard, the interpreter being ready and there having been an earlier adjournment, it is my conclusion that the refusal to adjourn did deprive the appellant of the right to a fair hearing, particularly where this is a protection claim requiring anxious scrutiny.
 14. If more were needed, the absence of some of the original documents is shown to have been a potentially material matter by the findings at [56] and [59] on the appellant's *sur place* claim and copies of photographs to support that claim. The originals were not available and the copies were not found to be sufficiently clear to show the

appellant attending a number of Tamil Government in Exile (TGTE, referred to in the decision as TNG).

15. For these reasons I found that the refusal of the adjournment request amounted to an error on a point of law such that the decision had to be set aside to be remade. The parties were in agreement that where the appellant had not had a fair hearing the appeal should be re-made in the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade in the First-tier Tribunal.

The appeal will be heard at Taylor House not before Judge C M Phillips

Signed: 
Upper Tribunal Judge Pitt

Date: 27 July 2017