



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00436/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR THASIYANTHAN KIRUPAMOORTHI
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Jegarajah, Counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 9 August 1992. He appeals against the decision of Judge of the First-tier Tribunal Chana sitting at Hatton Cross on 6 February 2018 who dismissed the Appellant's appeal against a decision of the Respondent dated 21 November 2017. That decision was to refuse the Appellant's application for international protection.

The Appellant's Case

2. The Appellant's case was summarised by the Judge at [14] to [18] of her determination. On 5 November 2008 the LTTE came to recruit the Appellant's older sister. The Appellant decided to go with the LTTE in her place. He received 15 days training and went to the frontline to fight the Sri Lankan army. On 20 April 2009 he put down his arms and was identified as an LTTE supporter by the Sri Lankan army and detained. After 11 months he was reunited with his family at Ananda camp and remained there for approximately one year. He went to India for a month but when he returned to Sri Lanka he was re-detained by the Sri Lankan army and made to work on a farm for approximately four to five years after which he managed to escape. He left Sri Lanka on 9 March 2017. He could not return to Sri Lanka because his life was in danger from the Sri Lankan army because of his escape from detention.
3. He arrived in the United Kingdom on 10 March 2017 but did not claim asylum until over two months later on 23rd of May 2017. The Appellant was substantively interviewed about his claim by the Respondent on 5 September 2017. During the interview which lasted five hours with breaks, he was asked a total of 157 questions. At the beginning of the interview the Appellant was asked whether he was feeling well enough to be interviewed to which he replied that he was. He was asked if he had any medical conditions and he replied that because of the army beating he had received he suffered from nightmares. When he thought of the past incidents he was unable to speak. He was not taking any prescribed medication and had not yet registered with a general practitioner.

The History of the Proceedings

4. The Respondent refused the claim on 21 November 2017 and the Appellant lodged his notice of appeal against that decision on 4 January 2018 almost a month out of time but the day after he had instructed his solicitors. His explanation for the delay was that he had only received the Respondent's decision on 30 December 2017. The grounds of appeal indicated that the Appellant would submit medical reports which would deal with the consistency and causation of his scarring and his current state of mental health. Time for lodging the notice of appeal was extended by a Tribunal Case Worker because there was no definite date for service of the Respondent's refusal decision.
5. The Respondent's bundle of evidence was sent to the First-tier Tribunal at Hatton Cross on 22nd of January 2018 and the case was listed for hearing on 6 February 2018. On 19 January 2018 the Appellant's solicitors wrote to the Tribunal asking for an adjournment on the grounds they had not received the Appellant's full GP records and they had referred the Appellant for assessment by a consultant psychiatrist to confirm whether or not the Appellant was fit to instruct legal representatives and whether or not he was fit to give evidence in court and be cross examined. They had arranged an appointment with Doctor Dhumad on 4 February 2018 and it would take

approximately two weeks to obtain a final report after that appointment. They also stated that they would be seeking to obtain other evidence but did not particularise what that was.

6. The application for an adjournment was refused by the Tribunal on 26 January 2018. The Appellant had been in the United Kingdom since March 2017 and had claimed asylum in May 2017. All the issues raised in the solicitors' letter should have been addressed in the previous months by the Appellant "and not left to the last minute". On 29 January 2018 the solicitors renewed their application for an adjournment following this refusal arguing that they had only been instructed on 3 January 2018. The only papers they had were those contained in the Respondent's bundle. The matter was privately funded, and it would be in the Appellant's interest to fully present the material medical issues.
7. This further application was refused on the basis that it added nothing of substance to the earlier request. In a separate letter dated 29 January 2018 the solicitors stated that counsel had had two telephone conferences with the Appellant but found it very difficult to take instructions. As the Appellant had not yet seen a general practitioner at the time of his asylum interview it was crucial to obtain his GP medical records and a psychiatric report. Verification reports from Sri Lanka in respect of documents submitted were still to be received.

The Decision at First Instance

8. When the matter came before Judge Chana on 6 February 2018 counsel renewed the application for an adjournment stating that the Appellant was suffering from mental health difficulties and was prima facie unable to give instructions to his representatives. The Appellant had seen a psychiatrist on Sunday (which I assume would therefore have been 4 February as indicated in the solicitors' letter) but the psychiatrist had said he could not make an evaluation of the Appellant until he had seen the Appellant's GP records. The solicitors had only had 28 days to prepare for the case. The Respondent opposed the application for an adjournment.
9. At [20] to [22] the Judge gave her reasons why she had refused the adjournment request. After directing herself that the test of whether to adjourn was one of fairness and citing **Nwaigwe [2014] UKUT 418** she stated: "I was of the view that there was no credible evidence before me that the Appellant was not able to give evidence on the day of the hearing. The Appellant was able to fully answer questions put to him at his screening interview on 23 May 2017 and answered 157 questions at his asylum interview on 5 September 2017. The full asylum interview was concluded about 4 ½ months ago. The Appellant signed the end of the interview record and gave no indication that he was mentally compromised and could not answer questions or give instructions. I was of the view that this was a ruse to delay his asylum claim. After I refused the adjournment request, Mr Paramjorthy said he has no further instructions in the matter and left the hearing centre with the Appellant. I decided to

proceed with the appeal and heard submissions from the Home Office presenting officer”.

10. The Judge gave her reasons in the determination for finding the Appellant’s account not to be credible and considered that the Appellant’s evidence had been fabricated in its entirety. She did not believe that the Appellant had been arrested or was wanted by the Sri Lankan authorities. He had not been threatened by the LTTE. None of the events happened as claimed by the Appellant. The Appellant was an economic migrant and a man of no credibility whatsoever. She dismissed the appeal.

The Onward Appeal

11. The Appellant appealed against this decision in grounds settled by his counsel who had withdrawn from the case and who himself made a statement in support of the grounds. In his statement counsel did not refer to the telephone conversations which according to the solicitors he had had with the Appellant. He referred to a conference some days before the hearing appeal hearing noting the Appellant did not maintain eye contact with him. Counsel said it was inherently difficult for him to take instructions notwithstanding his experience with Sri Lankan asylum appeals. He had not managed to take instructions from the Appellant due to the Appellant’s demeanour. The Judge’s view that the Appellant had engaged in a ruse to delay his asylum claim was “perhaps suggestive” that the Appellant’s representatives and his counsel were complicit in an attempt to delay his asylum claim and were involved in the ruse.
12. It was unclear why the Appellant’s representatives and counsel’s submissions were not considered to be credible. An informed observer would have reached the view that the Judge had reached a view as to the Appellant’s credibility prior to considering the appeal. The psychiatric evidence and the GP medical records now available did indeed corroborate the nature of the submissions made and the matter should have been adjourned.
13. In the accompanying grounds of appeal, it was stated that the Judge had fundamentally and materially erred in law by failing to adjourn the appeal hearing. It was not surprising that the Judge found the Appellant to be a man of no credibility given that the Judge had irrationally decided that the Appellant had engaged in a ruse to delay his asylum claim. The psychiatric report of Doctor Dhumad was now available and had concluded that the Appellant’s clinical presentation was consistent with a diagnosis of severe depression and PTSD and it would be extremely difficult for the Appellant to feign a full-blown mental illness. The Appellant’s oral evidence was crucial to a determination of credibility and the refusal to adjourn the matter had deprived the Appellant of discharging the burden of proof upon him.
14. Attached to the grounds of onward appeal was a report from Doctor Dhumad dated 16 March 2018 based on an interview with the Appellant dated 17 February 2018 (not 4 February 2018). The Appellant told Doctor Dhumad that he had been feeling

hopeless and suicidal. His presentation was consistent with a diagnosis of a severe depressive episode of psychotic symptoms. He also suffered from post-traumatic stress disorder the most likely cause of which was the incidence of torture in Sri Lanka. He was currently under the care of mental health services in Bedford and was on antidepressant medication waiting for psychological therapy.

15. At 17.5 of the report Doctor Dhumad wrote “in my opinion he is fit to attend court hearings and give evidence at present. However, he is severely depressed, anxious and his concentration is poor; this is likely to be worse during cross examination. Therefore, I respectfully recommend that the court considers allowing him more time and breaks to ease anxiety and support him to participate meaningfully.
16. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Alis on 4 April 2018. In refusing to grant permission to appeal he wrote that there were no medical notes or any report before the Judge and whilst counsel raised concerns the Judge had to decide whether it was fair to proceed based on the history of the matter. The Judge was satisfied she could and based on what was before her that was an option open to her. The fact that the Appellant now had obtained evidence that may support his inability to answer questions did not mean the Judge erred in refusing the adjournment.
17. The Appellant renewed his application for permission to appeal to the Upper Tribunal out of time without making any application for an extension. Nevertheless, Upper Tribunal Judge Coker in granting permission to appeal did extend time on the basis of the strength of the grounds relied upon. Noting that Judge Chana had taken the view that the adjournment request was a ruse to delay the asylum claim Judge Coker stated: “this is a very serious allegation to make implicating counsel and his instructing solicitors and potentially serious misconduct. There is no indication that the First-tier Tribunal Judge reported counsel to the Bar Standards Board. The findings by the Judge on the asylum appeal flow directly from her lack of acceptance that the Appellant had any mental health issues. The findings by the Judge are arguably unsafe and infected by numerous errors of law.”
18. She proceeded to give directions that in the absence of representations to the contrary from the Respondent the decision of the First-tier Tribunal would be set aside and the matter remitted for hearing with no findings preserved. The Respondent however did reply to the grant of permission by letter dated 27th of July 2018. The Respondent noted there was no interim report or medical evidence of any kind before the Tribunal to support the position of the Appellant’s representative that the Appellant was mentally unfit to give evidence. The Home Office Presenting Officer had highlighted to the First-tier Judge the previous lengthy interviews that had been completed without incident or difficulty. The determination of the First-tier Judge made no accusation of collusion between counsel and the Appellant to raise mental illness as a delaying tactic as was suggested in the grant of permission. The First-tier Judge accepted that the Appellant may have stopped instructing counsel but made clear that the absence of medical evidence and previous events led her to the

reasonable conclusion that this was nothing more than a ruse. The Judge was entitled to decide on the evidence available to her that it was fair to proceed in the absence of the Appellant.

The Hearing Before Me

19. In consequence of the grant of permission the matter came before me to determine whether there was a material error of law in the First-tier Tribunal determination such that it fell to be set aside and the appeal reheard. If there was no such material error the decision of the First-tier Tribunal would stand.
20. Counsel for the Appellant summarised the chronology of the proceedings stating that counsel who had appeared below, Mr Paramjorthy, would have been present at the error of law hearing but he was involved in another case and thus unable to attend. The Judge had not followed Presidential Guidance on vulnerable witnesses. Although the Appellant had been able to answer questions at interview there may have been a deterioration in his mental state after the interview. The application for an adjournment made before the hearing in the First-tier was subsequently proved correct by the medical evidence obtained after the hearing. The Appellant's PTSD could account for the vagueness of his account and the discrepancies therein. The Upper Tribunal Judge in granting permission to appeal had taken the view that this was a strong case and had invited the Respondent to agree to a remittal of the appeal.
21. A medical report having now been obtained the case was ready to proceed. The Respondent's bundle had only been produced a few days before the final hearing in mid-January. I queried with counsel what had stopped the Appellant's solicitors from obtaining a psychiatric report earlier. I also queried what was the evidence of mental health difficulties suffered by the Appellant prior to his solicitors receiving the Home Office bundle. Counsel replied that it was in the course of taking instructions that both his solicitors and counsel had recognised that there were concerns. The representatives would not prepare the case in detail until they had received the Respondent's bundle. They had not obtained a report earlier because they did not know anything was wrong. The solicitors could not be at fault for not recognising there was a matter of concern given the date of decision of 21 November 2017. Unless something was said by the Appellant to trigger an investigation it was difficult to act on it.
22. The expert's report from Doctor Dhumad was robust. There was other material which confirmed the Appellant was detained and put into a rehabilitation camp. There was a strong prima facie case. If counsel was concerned that giving evidence might harm the Appellant he had no option but to take the course he did to withdraw from the appeal.
23. In reply the Presenting Officer stated he had read counsel's statement. It was quite clear that the Judge thought this was a ruse by the Appellant not a ruse by counsel. It was not clear why Judge Coker thought that Judge Chana was blaming counsel.

Nevertheless, she had granted permission to appeal on that basis. The medical report from Doctor Dhumad could have been produced earlier. The refusal letter was two and a half months before the hearing and the Respondent's bundle was 2 to 3 weeks before the hearing. There was nothing of surprise in the Respondent's bundle.

24. In conclusion counsel for the Appellant stated there was no point in obtaining a psychiatric report prior to the Respondent's decision but every point in obtaining it prior to the hearing. After the decision in November 2017 it became apparent that there were mental health issues. The decision of the Judge that there was a ruse remained of concern. It could not mean that it was only the Appellant, the reasonable inference was that all the parties were involved.

Findings

25. The argument in this case turns on whether the Judge ought to have adjourned the hearing of the appeal for a psychiatric report on the Appellant to be obtained. She refused to adjourn the case on that basis and the response of both the Appellant and counsel was to withdraw from the court room. If the Judge was correct to have refused the adjournment request it was correct for her to continue with the case at that point, it being a matter for the Appellant whether he wished to engage in his own appeal.
26. The test of whether to adjourn a case is one of fairness as the First-tier Tribunal Judge pointed out in her determination. She was concerned that as at the date of the hearing before her there was no medical evidence to indicate: (i) that the Appellant had psychiatric problems; (ii) that a psychiatric report was necessary or (iii) that the Appellant was unfit to give evidence. In fact, the report of Doctor Dhumad when it did emerge said that the Appellant was fit to give evidence albeit some care should be taken in how he was to be questioned. It is difficult to see why that approach could not have been adopted at the hearing before Judge Chana rather than the Appellant and counsel walking out of the case.
27. Even if the report of Doctor Dhumad was not to hand at the date of the hearing before Judge Chana, if the Appellant was in fact fit to attend court and give evidence there is no good reason why he did not do so. Assuming that Dr Dhumad had seen the Appellant before the hearing as counsel indicated (as opposed to the date of the consultation given on the report) it is not clear why the Appellant's solicitors could not at the very least have telephoned Doctor Dhumad the day before the hearing to obtain some indication from him at that stage whether he was likely to indicate that the Appellant was or was not fit to give evidence. That would have assisted Judge Chana considerably. Doctor Dhumad could have informed the solicitors that the Appellant was fit to give evidence albeit with some necessary measures to ensure access to justice by in his view an otherwise vulnerable Appellant.
28. Permission to appeal was granted by Upper Tribunal Judge Coker because she was concerned that Judge Chana had implicated counsel in a ruse to delay the hearing of

the asylum appeal. Careful reading of the Judge's determination shows that not to be the case. The Judge was concerned that the ruse was on the part of the Appellant rather than counsel. If as Dr Dhumad pointed out the Appellant was fit to attend court and give evidence there was no good reason why he would be unable to give instructions to his counsel. The suggestion that the Judge thought that counsel might be involved in the ruse comes from counsel himself who indicated that the Judge's refusal to adjourn the case was "suggestive" that she considered there was some incorrect behaviour on the part of counsel. I do not consider that the Judge was in fact saying that or making any adverse remarks about counsel. The Judge was concerned about the absence of medical evidence.

29. I am bound to say I have not been given any good reason why if there were concerns about the Appellant's ability to give evidence a medical report was not obtained earlier. In order to admit post decision evidence in an appeal I have to consider the test in the well-known authority of **Ladd v Marshall**. Essentially the test is in two parts. Is the evidence to be admitted relevant to the proceedings and if so ought it reasonably to have been obtained earlier? The report of Dr Dhumad might be said to be relevant because of his comments on the Appellant's ability to give evidence, the Appellant's condition and the need for care when asking the Appellant questions.
30. However, I do not consider that a good reason was given why a report could not have been before Judge Chana at the date of the hearing before her. There is some confusion over when Dr Dhumad saw the Appellant. According to Doctor Dhumad he saw the Appellant on 17 February 2018 11 days after the hearing whereas counsel (and the solicitors' correspondence) indicated to Judge Chana that the Appellant had seen been seen by Doctor Dhumad on 4 February 2018 two days before the hearing, a difference of 13 days.
31. Of more concern is why the instruction of Dr Dhumad was very much left to the last minute. I do not accept the argument advanced to me in oral submissions that the Appellant's solicitors could not begin their preparation until they had received the Respondent's bundle. The Respondent's bundle comprised the screening interview and the substantive asylum interview, copies of which would have been supplied to the Appellant at the time they were made which he could have forwarded to his solicitors. There were also some copy documents which the Appellant had given to the Respondent further copies of which he could have forwarded on to his solicitors.
32. What was argued before me was that the solicitors could not be blamed for not recognising that the Appellant might have psychiatric difficulties and thus a report might be needed. There are two problems with that argument. The first is that in the grounds of appeal they submitted on 4 January 2018 they alluded to the possibility that the Appellant might have difficulties and there is no good reason therefore why they had not begun the process at that point of obtaining a report. The second difficulty is that the Appellant's medical records (which were not before Judge Chana) only appear to indicate difficulties with mental illness after the Appellant had seen his solicitors. The copy records produced to me during the course of the appeal

proceedings indicated only that in September and October 2017 he had what was referred to as a stress-related problem whereas the complaint of depression only began in January 2018.

33. There was also the point that the Appellant had been able to successfully participate in a lengthy substantive asylum interview. Doctor Dhumad had been given a copy of the interview with his instructions but he does not comment directly in his report on that interview. What is significant is that Doctor Dhumad's overall opinion is that the Appellant was fit to attend court hearings and give evidence. That was thus the position at the time of the hearing before Judge Chana. The fact that the Appellant did not wish to give evidence or wanted an adjournment to obtain a report, which with the benefit of hindsight would have said that in fact he was fit to give evidence, is not in my view enough to justify the Appellant and counsel walking out of the hearing.
34. The correct approach in line with the joint Presidential Guidance Note would have been to emphasise the difficulties the Appellant had had and to ask for the proceedings to be conducted appropriately. Judge Chana was presented with a fait accompli when instead of engaging with the appeal proceedings counsel and the Appellant left the room, counsel appearing to indicate that he was only instructed to apply for an adjournment not present the case as a whole. That basis of instructions was a matter for the Appellant and his representatives, but the Judge could only deal with the case on the basis of what was before her. She had no GP records, no psychiatric report and no indication that the Appellant had had any form of engagement with mental health services prior to the lodging of his appeal against the Respondent's decision.
35. She evidently regarded the application for an adjournment with some scepticism but she was not making some form of criticism of counsel in refusing the adjournment request. She was criticising the Appellant. He was able to engage with the Respondent when questioned in interview and was able to engage with Doctor Dhumad. He appears to have spoken previously to counsel but on the day of the hearing apparently was not prepared to engage with his own counsel hence the application for an adjournment. Counsel's statement made for the onward appeal is rather vague as to what difficulties counsel experienced in taking instructions. He only refers to two matters, a failure to maintain eye contact and a reference to being treated like an animal by the Sri Lankan army. It is not clear from counsel's statement why that created such difficulties that he could not take instructions. I was unable to probe this matter further because Mr Paramjorthy did not attend the hearing before me.
36. I appreciate that Judge Coker having taken the view that Judge Chana was criticising counsel's conduct felt that this elevated the argument in the case about procedural unfairness. However, if the Judge was not making a direct or indirect criticism of counsel's behaviour as I believe she was not, what the Judge was dealing with was a refusal by the Appellant to engage with his own appeal. In those circumstances the

Judge was entitled to take a robust view of the case and indicate she was not prepared to adjourn the case anymore than those persons who had refused the previous applications had been so prepared.

37. The test ultimately of whether it was fair to proceed was a matter for the Judge. She could only deal with the case on what was before her. As it happened the medical evidence when it came out indicated that the Appellant was fit to give evidence albeit with some adjustments which could have been suggested on the day of the hearing. What was less reasonable was for the Appellant to withdraw from the case in the way he did. I do not consider that there was a material error of law in the Judge's decision to refuse the oral application for an adjournment and instead to indicate that she intended to proceed with the hearing. I do not consider that her refusal to adjourn indicated that she had formed any pre-existing notion of the merits of the case or that she would do anything other than keep an open mind about the matter. Her use of the word "ruse" appeared in her determination after she had reviewed all matters, I do not read Mr Paramjorthy's statement to mean that the Judge used the word "ruse" in open court.
38. I do not agree with counsel's statement that the report of Doctor Dhumad and the GP records corroborate the nature of the submissions made. The argument that had been put forward was that the Appellant might be unable to give evidence on his own behalf, see paragraph 5 above. When the report came out it showed that the Appellant was fit to give evidence. The Judge was entitled to proceed as she did and the findings of fact that she made (including the adverse credibility findings) were open to her on the evidence. I do not consider there was any material error of law in proceeding with the hearing rather than adjourning. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11 September 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 11 September 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge